90-58

No.

JUL 2 1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL LYNN SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Are extensive background investigations for security clearance by the Department of Justice of a district judge's judicial staff, including law clerks, authorized by the Classified Information Procedures Act (CIPA), 18 U.S.C. App. IV § 9(a), and if so, does this intrusion into judicial independence violate the doctrine of separation of powers?

PARTIES BELOW

The parties below are as listed in the caption of the case.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties Below	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Statement of Jurisdiction	2
Constitutional, Statutory and Regulatory Provisions Involved	2
Statement of the Case	5
Reasons for Granting the Writ	14
I. Department of Justice Background Investigations for Security Clearance of Judicial Personnel Intrude on Core Judicial Functions and Violate the Separation of Powers	14
II. Authorization of Background Investigations by the Executive Without Prior Approval By the Court Exceeds the Scope of Congressional Delegation for CIPA Rulemaking	17
III. Exercise of the Court's Supervisory Power is Necessary to Curb Governmental Abuse and Procedural Irregularity in the District Courts	20
IV. The Issues are Ripe and May Be Unreviewable at Final Judgment; Postponement of Consideration Will Result in Irreparable Harm to Judicial Integrity	22

Conclusion 24

Appendix A-1

TABLE OF AUTHORITIES

	Page
Cases:	
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) ..	23
Bowers v. United States Department of Justice, 690 F. Supp. 1483 (W.D.N.C. 1988)	21
Bowsher v. Synar, 478 U.S. 714 (1986)	16,23
Butz v. Economou, 438 U.S. 478 (1978)	15
Cleavinger v. Saxner, 474 U.S. 193 (1985)	15
Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986)	16,23
Forrester v. White, 484 U.S. 219 (1988)	15,16
Hall v. Small Business Admin., 695 F.2d 175 (5th Cir. 1983)	15
McNabb v. United States, 318 U.S. 332 (1943)	21
Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946)	22
Mistretta v. United States, 488 U.S. 361 (1989)	16
Myers v. United States, 272 U.S. 52 (1926)	16
Oliva v. Heller, 839 F.2d 37, 39-40 (2d Cir. 1988)	15
Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988), *cert. denied,* 109 S.Ct. 2066 (1989)	15
Rea v. United States, 350 U.S. 214 (1956)	21
United States v. Payner, 447 U.S. 727 (1980)	22

United States v. Poindexter, North, et al., No. 88-0080 (D.D.C.), Transcript of Pretrial Hearing (April 12, 1988) 21

United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982) 19

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) 22

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 17

Constitution, Statutes and Regulations:

U.S. Const. art. II 2

U.S. Const. art. III 2,15

Classified Information Procedures Act (CIPA), 94 Stat. 2025, 18 U.S.C. App. IV

§3 2,4,5

§7 2,10,14,20,23

§9(a) 2,3,11,17,18

Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information (CIPA Security Procedures), 18 U.S.C.A. App. IV § 9 note (Supp. 1990)

generally 3,5,16,20

§4 ..... *passim*

§4, ¶5 11

§5 3,4,9

Foreign Intelligence Surveillance Act (FISA), 92 Stat. 1788, § 103(c), 50 U.S.C.A. § 1803(c) (Supp. 1990) 2,17

Security Procedures Established Pursuant to Public Law No. 95-511, 92 Stat. 1783, by the Chief Justice of the United States for the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review (FISA Security Procedures) § 4, ¶2, *reprinted in* Implementation of the Foreign Intelligence Surveillance Act, H.R. Rep. No. 96-558, 96th Cong., 1st Sess. 7, 8 (1979) . . 2,3,12, 17-19

5 U.S.C. § 552 21

18 U.S.C. §§ 2314, 2315, 922 and 924 5

26 U.S.C. §§ 2651 and 5861 5

28 U.S.C. §1254(1) 2

28 U.S.C. § 455 15

Supreme Court Rule 13.1 2

Other Authorities:

Rules of the House of Representatives, 101st Cong., Rule XLVIII, § 5 (rev. ed. 1989) 12,18

S. Res. 400, 94th Cong., 2d Sess. § 5(b) (1976), *reprinted in* 122 Cong. Rec. 4755 (1976) 12,18

S. Rep. No. 96-823, 96th Cong. 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 4294 18

H.R. Rep. No. 96-831, pt. 2, 96th Cong., 2d Sess. (1980) 19,20

Letter of William E. Foley, to Hon. Peter W. Rodino, Jr., *reprinted in Graymail Legislation,* Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 96th Cong., 1st Sess. 84 (1980) 16

The Federalist No. 48 (J. Madison) (Mentor ed. 1961) . . 10

The Federalist No. 78 (A. Hamilton) (Mentor ed. 1961) . 10

Letter from Michael C. Olmsted to Thomas Buchanan, Jan. 17, 1989 14

Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 Am.J.Crim.L. 277 (1986) 21

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on April 4, 1990.

OPINIONS BELOW

The opinion of the court of appeals is reported at 899 F.2d 564 (6th Cir. 1990) and appears in the Appendix at A-1, *infra.* The memorandum opinion of the district court on motion for reconsideration of the terms of its Protective Order is reported at 706 F.Supp. 593 (M.D. Tenn. 1990) and appears at A-13. The Protective Order of the district court appears at A-18.

STATEMENT OF JURISDICTION

The opinion and judgment of the court of appeals were entered on April 4, 1990. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1. Petitioner's Motion to Stay the Mandate was granted by the court of appeals on May 7, 1990 and extended on June 19, 1990. A-25, 26.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following provisions of law have an immediate bearing on this case:

1. Those structural aspects of the United States Constitution that embrace the doctrine of separation of powers, including especially article II, § 1, cl. 1, and § 3; and article III, § 1 and § 2, cl. 1 and cl. 3.

2. Classified Information Procedures Act (CIPA), 94 Stat. 2025, 18 U.S.C. App. IV, §§ 3, 7 and 9(a).

3. Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information (hereinafter CIPA Security Procedures), §§ 4 and 5, 18 U.S.C.A. App. IV, § 9 note (Supp. 1990).

4. foreign Intelligence Surveillance Act (FISA), 92 Stat. 1788, § 103(c), 50 U.S.C.A. § 1803(c) (Supp. 1990).

5. Security Procedures Established Pursuant to Public Law No. 95-511, 92 Stat. 1783, by the Chief Justice of the United States for the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review (hereinafter FISA Security Procedures) § 4, ¶ 2, *reprinted in* Implementation of the Foreign Intelligence Surveillance Act,

H.R. Rep. No. 96-558, 96th Cong., 1st Sess. 7, 8 (1979).

CIPA § 9(a) and §§ 4 and 5 of the CIPA Security Procedures are set out immediately below. The remainder of the cited provisions of law are reprinted at A-27.

Section 9(a) of CIPA provides:

> Within one hundred and twenty days of the date of the enactment of this Act, the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

Sections 4 and 5 of the CIPA Security Procedures provide:

> **4. Personnel Security - Court Personnel.** No person appointed by the court or designated for service therein shall be given access to any classified information in the custody of the court, unless such person has received a security clearance as provided herein and unless access to such information is necessary for the performance of an official function. A security clearance for justices and judges is not required, but such clearance shall be provided upon the request of any judicial officer who desires to be cleared.
>
> The court shall inform the court security officer or the attorney for the government of the names of court personnel who may require access to classified information. That person shall then notify the Department of Justice Security Officer, who shall promptly make arrangements to obtain any necessary security clearances and shall approve such

clearances under standards of the Executive Branch applicable to the level and category of classified information involved. The Department of Justice Security Officer shall advise the court in writing when the necessary security clearances have been obtained.

If security clearances cannot be obtained promptly, personnel in the Executive Branch having the necessary clearances may be temporarily assigned to assist the court. If a proceeding is required to be recorded and an official court reporter having the necessary security clearance is unavailable, the court may request the court security officer or the attorney for the government to have a cleared reporter from the Executive Branch designated to act as reporter in the proceedings. The reporter so designated shall take the oath of office as prescribed by 28 U.S.C. § 753(a).

Justices, judges and cleared court personnel shall not disclose classified information to anyone who does not have a security clearance and who does not require the information in the discharge of an official function. However, nothing contained in these procedures shall preclude a judge from discharging his official duties, including giving appropriate instructions to the jury.

Any problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action.

5. Persons Acting for the Defendant. The government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense and may bring such information to the attention of the court for the court's consideration in framing an appropriate protective order pursuant to Section 3 of the Act.

STATEMENT OF THE CASE

This petition arises from pretrial orders in a federal criminal prosecution governed by the Classified Information Procedures Act (CIPA), 18 U.S.C. App. IV. Petitioner, a United States Army major formerly assigned to an intelligence support unit, was indicted on September 14, 1988 on five counts alleging the transportation and concealment of stolen firearms and the possession of a silencer which was unregistered and without a serial number, under 18 U.S.C. §§ 922, 924, 2314 and 2315, and 26 U.S.C. §§ 2651 and 5861.

Shortly thereafter, the government submitted a proposed protective order under § 3 of CIPA, which provides that upon motion by the government, the court shall issue "an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States." The government's proposed order included provisions requiring that judicial personnel undergo security clearance background investigations, as follows:

> 1. This case will involve classified national security information, the storage, handling and control of which requires special security precautions mandated by statute and executive orders and regulations; and access to which requires a security clearance and a "need to know."
>
> 2. The procedures set forth in this Protective Order, the Classified Information Procedures Act and the security procedures referred to above will apply to all pre-trial, trial, post-trial, and appellate matters concerning this case.
>
> 3. This Order shall apply to defense counsel, N. Reese Bagwell, Esquire, the defendant Michael L. Smith, and any other person, other than the attorneys for the government, who may later receive access through the United States Department of Justice to classified national security

> information or documents in connection with this case (hereinafter "cleared persons"). ...
>
> . . .
>
> 12. For the purpose of establishing security clearances necessary for access to classified information that may be involved in the pre-trial preparation or trial of this case, Standard Form 86, "Security Investigation Data for Sensitive Position," attached releases, and full fingerprints shall be completed and submitted to the Court Security Officer forthwith by all persons whose assistance the defense reasonably requires and *by such courtroom personnel as the Court requires for its assistance.* The Court Security Officer shall undertake all reasonable steps, including, but not limited to *consultation with the attorneys for the government* to process all security clearance applications in accordance with applicable regulations.

Proposed Protective Order submitted Oct. 18, 1988, R. 11 (emphasis added).

In its Appellant's Brief in the court of appeals, the government described the procedure that it would follow (and has followed) in such a CIPA case:

> Once the information is collected by the Court Security Officer, it is forwarded through the Department of Justice Security Officer to the FBI. Background investigations are completed on the designated personnel, and the reports of that investigation are returned to the Department Security Officer. Pursuant to the explicit language of the CIPA security procedures, that Security Officer then approves the clearance of the designated personnel, "under standards of the Executive Branch applicable to the level and category of classified information involved." The Department Security Officer then advises the court, in writing, when the necessary clearances have been obtained. *See*

> Section 4 of the security procedures established pursuant to CIPA Section 9.

Appellant's Brief at 5 n. 2. On January 10, 1989, the district court entered a Protective Order which, in large part, followed the draft submitted by the government.

The district court did not, however, accede to the government's insistence that members of the court's personal staff (or defense counsel) be subjected to security clearance investigations before being given access to classified material. Instead, the district court designated its secretary, courtroom deputy, court reporter, and law clerk as persons authorized to have access to classified information provided that they executed a Memorandum of Understanding to be filed with the court. Paragraph 6 of the court's order provided:

> The court finds that, in order to protect the classified information involved in this case, no person except the defendant, counsel for defendant, employee of counsel for defendant or defense witness shall have access to the classified information involved in this case. No counsel for defendant, employee of counsel for defendant or defense witness shall have access to any classified information in this case unless that person shall first have:
>
> a. received an approval for access to the appropriate level of classification from the Court on a need to know basis; and
> b. signed the Memorandum of Understanding in the form attached hereto agreeing to comply with the terms of this Order.
>
> The Court designates the following persons on its staff as authorized to have access to classified information in this case:

> Susan Armor, Secretary
> Joyce Merritt, Courtroom Deputy
> John Tummel, Court Reporter
> Alex Fardon, Law Clerk
>
> Each of the above named persons shall execute the Memorandum of Understanding and file the same with the court. No other persons, clerk's office nor in the Judge's chambers, shall have access.

Protective Order of Jan. 10, 1989, A-20-21. The four named court personnel subsequently executed Memoranda of Understanding identical to the form attached at the end of the Protective Order. R. 20-23, 41.

The Memorandum of Understanding states in relevant part:

> I have received, read and understand the Protective Order entered by the United States District Court for the Middle District of Tennessee on January 9, 1989, in this case and I agree to comply with its provisions and to provide the information requested below.

Attachment to Protective Order of Jan. 10, 1989, A-24.

In addition, Paragraph 9 of the Protective Order provides for sanctions against any unauthorized disclosure of classified materials by persons authorized to receive them. It states:

> Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible reference for criminal prosecution. Persons subject to this Order are advised that direct or indirect unauthorized disclosure, retention or negligent handling of classified documents or information could cause serious damage, and in some cases exceptionally grave damage, to the na-

> tional security of the United States or may be used to the advantage of a foreign nation against the interests of the United States.

Protective Order, A-22-23.

The government sought reconsideration of the District Court's January 10 Protective Order, arguing that Department of Justice background investigations and security clearance of courtroom personnel were required by § 4 of the CIPA Security Procedures, by the standards of the Executive Branch applicable to the classified information involved in this case, and by considerations of comity among the constituent branches of government in the interests of national security.

The district court denied the government's motion. The court's memorandum opinion clearly assumed that § 4 of the Security Procedures facially requires formal security clearance for courtroom personnel and gives the Department of Justice the power to grant or deny them. The court squarely held this aspect[1] of the Security Procedures unconstitutional:

> Section 4 violates judicial independence and the separation of powers. It gives the executive branch veto power over a federal judge's choice of court personnel. The executive unilaterally conducts the investigations, establishes the clearance standards, and determines who meets or does not meet those standards.
>
> This interferes with the very core of the judicial process. A "court" is more than a judge; it is a tightly integrated unit composed of the judge and those he carefully selects

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[1] The court also rejected the government's view that § 5 of the Security Procedures requires defense personnel to obtain security clearances as without "authority in that section" and questioned "whether such a requirement, if it existed, would violate defendant's sixth amendment right to counsel." Order of Feb. 10, 1989, A-17 n. 1, 706 F. Supp. at 596 n.1.

> to assist him in fulfilling his duties. The court staff subjected to executive scrutiny through § 4 are in a very real sense an extension of the judge himself. The CIPA procedures thus invite executive officials into a court's chambers and authorize them to dictate to federal judges the manner in which they conduct their business.
>
> . . .
>
> Our Founders recognized that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." They also realized that ... "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments" [and that no branch] "ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers." ... Section 4 of the CIPA procedures violates these fundamental principles.
>
> The insidious evil envisioned by § 4 is its effect on the impartiality of the Court and the public perception and appearance of impartiality. If the Justice Department can investigate the tax returns and personal lives of anyone in the Court's employ, there is the potential for intimidation and unjustified favorable treatment. Even if this potential does not exist, the appearance of its possibility undermines public confidence in absolute impartiality. ... Allowing the Department of Justice *any* voice in selection of court personnel dealing with a case in which it is a party offends the most elementary notions of fair play and impartial justice.

Order of Feb. 10, 1989, A-14-15, 706 F. Supp. at 594-95 (emphasis original) (citations omitted) (quoting *The Federalist* No. 78, at 466 (A. Hamilton) and *The Federalist* No. 48, at 308 (J. Madison) (Mentor ed. 1961)).

The government appealed pursuant to CIPA § 7, which gives the government the unilateral right to an interlocutory appeal

from "a decision or order of a district court in a criminal case ... refusing a protective order sought by the United States to prevent the disclosure of classified information."

In the court of appeals, petitioner and *amici curiae*[2] argued that § 4 of the Security Procedures, construed as both the government and the district court interpreted it, was unauthorized by the CIPA statutory provision[3] that directed the Chief Justice to promulgate the Security Procedures, as well as a violation of the separation of powers (as the district court had held). *Amici* also argued that the constitutionality of § 4 might be saved in whole or in part by reading the section's final paragraph to reserve to the district judge the final power to decide whether given court personnel participated in a CIPA case.[4]

The court of appeals reversed. Finding that "law clerks, secretaries and bailiffs ... do not and should not decide cases[,]" the court said the Executive Branch security clearance requirement "only mildly intrudes into the manner in which federal judges conduct business." A-11, 899 F.2d at 570. The court added that its holding in this regard was made "[i]n light of the provision of § 4 [of the Security Procedures] in which the Judicial Branch retains authority to resolve 'any problems of

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[2] *Amici* in the court of appeals were the American Civil Liberties Union of Tennessee, the Tennessee Association of Criminal Defense Lawyers, and the National Association of Criminal Defense Lawyers.

[3] 18 U.S.C. App. IV § 9(a).

[4] The paragraph provides:

> Any problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action.

CIPA Security Procedures §4, ¶5, 18 U.S.C.A. App. IV § 9 note.

security' arising from the administration of the system of security clearances", and that district courts "retain sufficient power to preclude the Executive from engaging in procedures that intrude upon both the judicial function and, potentially, the privacy interests of court personnel." A-2, 11-12, 899 F.2d at 565, 570.

Noting that rules promulgated by the Chief Justice for the Foreign Intelligence Surveillance Court[5] and rules of the House of Representatives and Senate[6] governing security clearances for Intelligence Committee personnel dealing with classified information also follow a pattern of non-executive branch use of security clearance procedures "designed and administered by the Department of Justice," the court of appeals said it was "evident" that the Legislative Branch had determined that such an arrangement did not unconstitutionally interfere with its own functioning, and had "subjected the judiciary" before to "security measures designed and administered by the Department of Justice." A-7-8, 899 F.2d at 568.

The court of appeals noted further that, because the district court "precluded the Executive from performing any initial background checks in this case, the propriety of the checks themselves is not at issue." A-12, 899 F.2d at 570. Also, because the Department of Justice had not actually denied clearance to any judicial employee or refused that employee access to classified information, "the question of who shall have the final authority to decide which judicial employees may see the classified information" was not "ripe" for judicial resolution. A-5-6, 899 F.2d at 567.

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[5] FISA Security Procedures § 4, ¶ 2, A-30.

[6] Rules of the House of Representatives, 101st Cong., Rule XLVIII, § 5 at 30 (rev. ed. 1989); S. Res. 400, 94th Cong., 2d Sess. § 5(b) (1976), *reprinted in* 122 Cong. Rec. 4755 (1976).

The court concluded that "[p]roper administration of the regulations is therefore consistent with the doctrine of separation of powers." So contrued, the Security Procedures "do not on their face, or as applied in this case so far, violate principles of separation of powers," and therefore the "executive branch may conduct reasonable background investigations, subject to district court review, of judicial personnel before such personnel are cleared to work on a case involving classified information." A-12, 899 F.2d at 570.

REASONS FOR GRANTING THE WRIT

There are two principal reasons to grant the petition: the importance of the issues, which arise from the application of rules promulgated ten years ago by the Chief Justice, and the rare opportunity provided for this Court to address those issues in a supervisory capacity. Parts I and II *infra* describe the substantiality of the separation-of-powers and scope-of-delegation issues; Parts III and IV demonstrate that the issues in this case are ripe and recurring problems in the district courts which have been structurally insulated from appellate review by government practice and by the unilateral interlocutory review feature of CIPA § 7.

I. Department of Justice Background Investigations for Security Clearance of Judicial Personnel Intrude on Core Judicial Functions and Violate the Separation of Powers.

Most fundamentally, this case raises issues of core concern that threaten both the independent administration of the judiciary and the assurance of a fair trial before an impartial tribunal for criminal defendants charged in cases implicating national security interests. Compelling the core staff, including law clerks, of the very judge before whom a criminal case is to be tried to undergo intrusive background investigations performed by the Department of Justice *and supervised by the prosecutor in the case*[7] raises the specter of prosecutorial influence

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[7] This is more than a hypothetical concern. Defense counsel in this case received a letter from the prosecutor advising that Department security officers wanted to discuss his "recent trip to Russia" with him before his clearance could be granted. Letter from Michael C. Olmsted to Thomas Buchanan, Jan. 17, 1989, A-34 (part of the record below). Also, the government's proposed protective order provided that the Court Security Officers would "consult[] with the attorneys for the government to process all security clearance applications." Proposed Protective Order, ¶ 12, R. 11, *See* p. 6, *supra*.

upon (or even intimidation of) those key courtroom personnel who may play important roles in the deliberative processes of the court.

Petitioner respectfully suggests that the court of appeals ignored the reality of the often critical role played by court staff (particularly law clerks) in a federal judge's decisional process. Obviously law clerks "do not and should not decide cases;" article III vests that power in the judge. But the intimate involvement of many law clerks in the formation of judicial opinion — whether as researchers, preliminary drafters, sounding boards, foils or confidants — cannot be denied. These roles clearly partake of the decisional judicial functions at the core of article III. *See Forrester v. White*, 484 U.S. 219, 227 (1988) ("resolving disputes between parties who have invoked the jurisdiction of a court" are "the paradigmatic judicial acts").

Doctrines evolved to deal with the related problems of immunity from suit and judicial disqualification illustrate the inseparability of close judicial advisors from the judges they serve. The federal courts long have recognized[1] that law clerks and others participating in the performance of judicial acts share in the judge's absolute immunity and must be subject to identical strictures for purposes of disqualification under 28 U.S.C. § 455. *See, e.g., Oliva v. Heller*, 839 F.2d 37, 39-40 (2d Cir. 1988) ("for purposes of absolute judicial immunity, judges and their law clerks are the same"); *Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) ("the clerk is forbidden to do all that is prohibited to the judge"); *cf. Parker v. Connors Steel Co.*, 855 F.2d 1510, 1525 (11th Cir. 1988) (recognizing "importance that some law clerks play in the decisional process").

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[1] The cases derive from the "functional" approach this Court took to qualified immunity in *Butz v. Economou*, 438 U.S. 478, 511-13 (1978), and applied to absolute judicial immunity in *Cleavinger v. Saxner*, 474 U.S. 193, 201-02 (1985).

The interests protected in the areas of immunity and disqualification are the same as those implicated by Department of Justice security clearance procedures, *i.e.*, freedom of the judiciary from outside influences (or the appearance of such) that might result in bias or "timidity" that would "manifestly detract from independent and impartial adjudication." *Forrester v. White, supra,* 484 U.S. at 226-27.

Intrusion of this sort by the Executive presents the sort of "potential domination"[9] of the "weakest" branch of government by another branch for which the principle of separation of powers must serve as a structural counterweight. Interbranch "clearance" is a coercive kind of regulation of the core function of one branch by another, threatening (or accomplishing) the removal of a key actor in another branch. *See Bowsher v. Synar,* 478 U.S. 714, 726-27 (1986); *Myers v. United States,* 272 U.S. 52 (1926). This is not the kind of function of a branch that the judiciary could waive or cede to another branch,[10] even if it so chose.[11] Lack of any lawful support from the other branches

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[9] *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 848 (1986).

[10] *Cf. Bowsher v. Synar,* 478 U.S. at 719 n.1, and 478 U.S. at 759 (White J., dissenting) (rejecting argument that presidential non-veto of legislation would save Gramm-Rudman-Hollings Act's Congressional intrusion into Executive functions); *Mistretta v. United States,* 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714, 730-31 (1989) (delegation of legislative power to another branch without "intelligible principle" forbidden).

[11] Promulgation of the CIPA Security Procedures can hardly be viewed as a voluntary act by the Judicial Branch in any event. The Judicial Conference adopted a pre-enactment position against the Chief Justice promulgating the Security Procedures, instead recommending to the House Judiciary Committee that either the Conference or a Conference committee be the promulgator. *See* Letter of William E. Foley, director, Administrative Office of the U.S. Courts, to Hon. Peter W. Rodino, Jr., *reprinted in Graymail Legislation,* Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 96th Cong., 1st Sess. 84 (1980).

therefore places this executive intrusion in its weakest posture. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Nor can the utilization of executive security clearance devices by Congress or the FISA Surveillance Court serve as any precedent for separation of powers purposes. Congress is generally better equipped than the "weakest" branch for the rough and tumble of jousting with the executive intelligence community. A court adjudicating the liberty of a criminal defendant is in a much more delicate position than the Surveillance Court, which deals only with probable cause, Fourth Amendment and related statutory privacy issues. In any event, both Congress and the Surveillance Court carefully preserve[12] their own independence against executive domination — a feature lacking in the decision below.

II. Authorization of Background Investigations by the Executive Without Prior Approval by the Court Exceeds the Scope of Congressional Delegation for CIPA Rulemaking.

Petitioner also submits that § 4 of the CIPA Security Procedures is unauthorized by Congress to the extent that it permits the Department of Justice to perform background investigations of judicial staff without the authorization, approval and supervision of the district judge. Such authority would depart wholly from the model of security approval for certain judicial personnel employed by the Foreign Intelligence Surveillance Court (hereinafter Surveillance Court) established under the Foreign Intelligence Surveillance Act (FISA), Pub. L. 95-511, 50 U.S.C. § 1801 *et. seq.*

CIPA § 9(a) provides that "rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts,

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[12] *See infra* Part II, n.13.

courts of appeal, or Supreme Court" should be prescribed by the Chief Justice, "in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense." The legislative history explains that this section was "based on the Section 103(c) of [FISA] which has worked well in practice in preventing the compromise of classified information submitted to the Federal courts." S. Rep. No. 96-823, 96th Cong. 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4294, 4305. FISA was drafted by the same Congressional committees as CIPA.

However, the FISA Security Procedures established by Chief Justice Burger in 1979 provided only that Surveillance Court personnel:

> receive[] a security clearance *determined appropriate by the court* in consultation with the Attorney General and the Director of Central Intelligence. All court personnel having access to court records shall sign appropriate security agreements. If a question concerning the security clearance of court personnel is raised subsequent to appointment, the matter shall be referred *to the court* which may consult the Attorney General and the Director of Central Intelligence regarding its security significance before taking such action as *it* deems appropriate.

FISA Security Procedures, § 4 (emphasis added), A-30.

Section 4 of the CIPA Security Procedures differs from Section 4 of the FISA Security Procedures in a critical respect: the FISA provision leaves the "determination" of what clearance is "appropriate" always in the hands of the court.[13] The CIPA

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[13] Analogous to the FISA provision, both the House and Senate rules assign to the respective Congressional committee the responsibility to "determine" what security clearance shall be "appropriate." *See* House Rule XLVIII, § 5 and S. Res. 400, § 5(b), *supra* n.6.

provision, as construed below, gives to the Department of Justice the initial discretion to decide what information will be gathered, as well as what further steps will be taken to investigate a judicial employee's background.[14]

The court of appeals held that the Department's actions would be "subject to district court review." A-12, 899 F.2d at 570. Petitioner respectfully suggests that "review" of the investigation will be too little, too late. Only if the district court "determines" in the first instance what clearance may be "appropriate" is the FISA model followed, and judicial independence and autonomy thus preserved.

A rulemaker cannot promulgate rules that provide contrary "explication" of an issue already defined with considerable specificity in the authorizing statute or that are "fundamentally at odds with the manifest congressional design." *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24, 26 (1982). There is a wealth of legislative history, too voluminous to recite at length in this petition, to support the proposition that Congress intended the CIPA Security Procedures to serve only as "housekeeping" measures. *See, e.g.*, H.R. Rep. No. 96-831, pt. 2, 96th

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[14] Those steps include, at the outset, completion of Standard Form 86, United States Office of Personnel Management. Proposed Protective Order, R. 11. Releases sought include a "tax check waiver," fingerprinting, and waiver of a variety of confidential information otherwise subject to privacy protection:

> any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, financial or lending institutions, credit bureaus, consumer reporting agencies, retail business establishments, [and] attendance, personnel history, disciplinary, ... arrest, conviction, medical, [and] psychiatric/psychologecal [records].

Cong., 2d Sess. 8 (1980).[15] As construed below, the CIPA Security Procedures exceed the scope of delegation to the Chief Justice.

III. Exercise of the Court's Supervisory Power is Necessary to Curb Governmental Abuse and Procedural Irregularity in the District Courts.

A compelling additional reason for this Court to exercise its discretionary jurisdiction in this case is the rare opportunity presented to clarify the scope and meaning of the CIPA Security Procedures, which (although promulgated by the Chief Justice) have never been addressed by the Court, and whose abuse unfortunately has been largely insulated from appellate review.

The unusual unilateral interlocutory appeal provided to the government by CIPA § 7 has resulted in procedural disuniformity in the federal district courts trying CIPA cases. A few

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[15] The House Committee cautioned:

> Normally, such rules are proposed by the Supreme Court and submitted to Congress. It was suggested that for the Attorney General and the CIA Director to have a role in this process was inappropriate, as was the exclusion from the process of the other justices of the Supreme Court. The Committee would have serious reservations about departing from the procedure routinely followed if it understood the rules at issue to be of a substantive nature, as for example, the Rules of Criminal Procedure. However, the Committee understands the rules contemplated in [what became § 4] to be housekeeping rules: where safes are to be located, who is to have the combinations, how many court employees can have access to the documents, and the like. The physical security of the documents is the focus of this section and, on that basis, the Committee has no reservation about placing the responsibility for assuring that security in the three individuals named. ...

district courts[16] have rejected the government's practice of seeking expansive protective orders of the type sought in this case, both with respect to courtroom staff and defense counsel. But defendants have no opportunity to appeal from the rulings of those district courts that have tolerated the government's security practices. Since the government never before has appealed from an adverse district court CIPA ruling on security clearances,[17] there are no federal appellate court precedents (other than the instant opinion of the court of appeals) to guide the district courts, the government, or defendants.

The constitutional slippage (and case law vacuum) that has developed in the many district courts trying CIPA cases[18] provides strong reason for this Court to exercise its supervisory power to provide a remedy for abridgement of recognized constitutional principles. *See Rea v. United States,* 350 U.S. 214, 217 (1956); *McNabb v. United States,* 318 U.S. 332, 341 (1943).

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[16] District Judge Gesell, for example, refused to order his clerks or defense counsel to submit to mandatory screening by the Department of Justice in the early stages of *United States v. Poindexter, North, et al.,* No. 88-0080 (d.D.C.). The government did not appeal from a subsequent protective order entered in conformity with Judge Gesell's bench ruling. *See* Transcript of Pretrial Hearing, A-31-33. (The transcript was supplied by *amici* to the court of appeals.)

[17] In the Fourth Circuit, District Judge McMillan three years ago denied a government motion to require security clearance of his staff in a civil Freedom of Information Act, 5 U.S.C. § 552, case to which CIPA does not apply. The Fourth Circuit overruled him in an unpublished order granting the government's petition for mandamus. Judge McMillan responded by erecting a "Chinese wall" of secrecy between himself and his staff, thus "handl[ing the] file myself." *See Bowers v. United States Department of Justice,* 690 F.Supp. 1483, 1488-89 (W.D.N.C. 1988).

[18] *See also* Tamanaha, *A Critical Review of the Classified Information Procedures Act,* 13 Am.J.Crim.L. 277, 287-90 (1986) ("de facto" clearance requirement for defense counsel evades judicial review).

This Court's use of the supervisory power is particularly appropriate "in the determination of the procedures to be employed by courts to enforce their orders, a subject that directly concerns the functioning of the judiciary." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987). A major goal of the supervisory power is to "protect the integrity of the *court*." *United States v. Payner*, 447 U.S. 727, 735 n.8 (1980) (emphasis original). The need for supervision from this Court seems particularly pronounced when the procedures in question were promulgated by the Chief Justice himself. Lower federal courts may be reluctant to call into question either the authority for, or the constitutionality of, rules promulgated by a Chief Justice (even when that Chief Justice is no longer sitting).[19]

IV. The Issues are Ripe and May Be Unreviewable at Final Judgment; Postponement of Consideration Will Result in Irreparable Harm to Judicial Integrity.

Petitioner is aware that only in an unusual case will the Court exercise certiorari jurisdiction on an interlocutory matter. However, there are compelling reasons why this case should be such an occasion.

Judicial integrity is at stake. According to the judgment in the court of appeals, investigation of the district judge's staff would begin immediately upon issuance of the mandate. The harm already will have occurred, and would be reviewable by this Court only in the event petitioner were convicted on the merits. Although acquittal of petitioner would mean the injury to judicial independence and the appearance of a fair trial will have been harmless *to petitioner*, the damage to the judiciary

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[19] There is of course no barrier to this Court reviewing the validity of rules promulgated by itself or any member of the Court. *See Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946) (courts may review "validity" of Federal Rules of Civil Procedure).

will have been done,[20] and the opportunity lost for prevention of future harm.

Pretrial delay has already occurred in this case (14 months elapsed between the government's decision to appeal the district court's order and the judgment of the court of appeals). Any further delay is only marginally incremental when compared to the singular opportunity presented for the Court to consider the issues raised.

Finally, petitioner respectfully suggests that the court of appeals erred by its conclusion that the "question of who shall have the final authority to decide which judicial employees may see the classified information after the background check is performed" is not ripe for resolution. This Court's precedents on ripeness surely encourage consideration of this question, both from a jurisdictional and prudential perspective. The separation of powers issue (judicial intimidation) is raised simply by the threat of prosecutorial action; no actual denial of clearance by the Departmental Security Officer is necessary to trigger the constitutional concerns.[21] And remand without direction to the district court on this sub-issue might precipitate yet another round of government pretrial appeals under CIPA § 7.

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[20] Petitioner has a vital personal interest in Article III, § 1's "guarantee of an independent and impartial adjudication by the federal judiciary," which also serves to protect the broader "role of the independent judiciary" in the constitutional scheme. *Commodity Futures Trading Comm'n v. Schor, supra,* 478 U.S. at 848.

[21] *See Bowsher v. Synar, supra,* 478 U.S. at 727 n. 5 (rejecting contention that constitutional issue was not ripe until Comptroller General actually was removed by Congress); *cf. generally Abbott Laboratories v. Gardner,* 387 U.S. 136, 153 (1967).

CONCLUSION

For all the reasons stated above, petitioner respectfully requests the Court to grant the petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 89-5182

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellant,
v. Michael Lynn Smith,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee

Decided and Filed April 4, 1990

Joe B. Brown, U.S. Atty., Office of the U.S. Atty., Nashville, Tenn., Michael C. Olmsted, Trial Atty. (argued), Theodore S. Greenberg, U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellant.

Thomas Buchanan, Washington, D.C., N. Reese Bagwell (argued), Clarksville, Tenn., for defendant-appellee.

Edmund L. Carey, Jr. (argued), Neal & Harwell, Nashville, Tenn., for amicus curiae, Tennessee Ass'n of Criminal Defense Lawyers and American Civil Liberties Union of Tennessee.

Before: MERRITT, Chief Judge; KRUPANSKY, Circuit Judge; and GRAHAM, District Judge*

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* The Honorable James L. Graham, United States District Court for the Southern District of Ohio, sitting by designation.

MERRITT, Chief Judge. The United States appeals the denial of a proposed protective order under a government secrecy statute known as the Classified Information Procedures Act, 18 U.S.C. app. IV (1988),[1] an enabling statute delegating to the Chief Justice authority to issue regulations governing the security clearance of judicial employees in cases in which classified information is admitted. Section 4 of the regulations issued by the Chief Justice provides that "[a]ny problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action." The issue presented on appeal is whether various police and intelligence agencies of the Executive Branch may, in accordance with their standard security clearance procedures, investigate Judicial Branch employees whom the court has designated to work on a criminal proceeding involving classified information. In light of the provision of section 4 in which the Judicial Branch retains authority to resolve "any problems of security" arising from the administration of the system of security clearances, we hold that such investigations do not violate the principle of separation of powers. We therefore reverse the decision below.

I

According to the indictment, Major Michael L. Smith transported and concealed stolen goods, possessed an

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[1] Congress enacted the Classified Information Procedures Act to deter the practice of "greymail" in cases involving government secrets. "Greymail" occurs when a defendant seeks to disclose classified information as part of his or her defense, requiring the government either to permit disclosure or to dismiss the prosecution. The Act permits the government to have the trial court examine classified information *in camera* and *ex parte* and determine whether it is necessary for the defense, or if a proffered substitution would suffice to protect the defendant's constitutional rights and the secrecy of the information. 18 U.S.C. app. IV (1988).

unregistered silencer, and possessed a silencer without a serial number. The government alleges that Major Smith illegally obtained $60,000 worth of weapons which Army investigators discovered during a consent search of the major's house. According to the government, when he allegedly stole the weapons, Major Smith was a member of the "Intelligence Support Activity," and Army unit with classified, undisclosed duties. Because the prosecution and defense of this case is said to involve classified information relating to Smith's duties, the United States moved for protection of the information under section 3 of the government secrecy statute, 18 U.S.C. app. IV § 3 (1988). The proposed protective order would require court employees, e.g., law clerks and secretaries, to submit to government investigation and clearance before being permitted to handle any classified information.

District Judge Wiseman issued an order protecting the classified information. He did not, however, honor the government's request that the Executive Branch perform background investigations on all courtroom personnel. Instead, Judge Wiseman specified particular individuals, including a secretary and a law clerk, whom he designated as authorized to have access to classified information. Those designated individuals would, according to Judge Wiseman's order, be required to sign a memorandum of understanding, a document indicating that the signer understands the possible dangers to the United States posed by unauthorized release of classified information. When the designated security officer asked Judge Wiseman whether he should arrange for clearances for the personnel, the Judge said it would not be necessary. *See United States v. Smith,* 706 F. Supp. 593, 594-96 (M.D. Tenn. 1989).

The United States moved for reconsideration. It argued that the security regulations that Chief Justice Burger promulgated

pursuant to section 9 of the Act[2] (hereinafter "Burger regulations") required Judge Wiseman to permit the Executive Branch to perform background checks on all courtroom personnel before the court received any classified information. Section 4 of the Burger regulations states that

> No person appointed by the court or designated for service therein shall be given access to any classified information in the custody of the court, unless such person has received a security clearance as provided herein and unless access to such information is necessary for the performance of an official function. . . .
>
> The court shall inform the court security officer or the attorney for the government of the names of court personnel who may require access to classified information. That person shall then notify the Department of Justice Security Officer, who shall promptly make arrangements to obtain any necessary security clearances and shall approve such clearances under standards of the Executive Branch applicable to the level and category of classified information involved. . . .
>
> . . . .
>
> Any problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action.

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[2] The Act states in pertinent part:

> [T]he Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court.

18 U.S.C. app. IV § 9(a)(1988).

In a comprehensive opinion designed to maintain the independence of the Judicial Branch, Judge Wiseman denied the motion. Finding that the "CIPA procedures . . . invite executive officials into a court's chambers and authorize them to dictate to federal judges the manner in which they conduct their business," he held that section 4 of the Burger regulations violated the constitutionally-mandated separation of powers and the independence of the judiciary. *See Smith,* 706 F. Supp. at 594.

After Judge Wiseman denied the motion for reconsideration, the United States brought an interlocutory appeal to this Court pursuant to § 7(a) of the Act. That section provides that an interlocutory appeal may be taken "from a decision or order of a district court in a criminal case authorizing the disclosure of classified information. . . ." Because Judge Wiseman's order is said to have the effect of permitting the disclosure of classified information to putatively unauthorized persons, we have appellate jurisdiction under § 7(a).

II

Section 9 of the Act directed the Chief Justice of the United States — then Chief Justice Burger — to establish procedures ensuring the security of the classified information while a court is using it. Congress intended these procedures to be basic "housekeeping rules," covering "where safes are to be located, who is to have the combinations, *how many court employees can have access to the documents,* and the like." H.R. Rep. No. 831, 96th Cong., 2d Sess., pt. 2, at 8 (1980) (emphasis added). Congress did not further delineate what procedures the Chief Justice should adopt with regard to background checks of personnel.

The Burger regulations explicitly provide that court personnel must undergo a security examination designed and conducted by Executive Branch personnel. On the question of who shall

have the final authority to decide which judicial employees may see the classified information after the background check is performed, section 4 of the regulations states that "[a]ny problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action." Because Judge Wiseman forbade the Department of Justice from engaging in the first step under the regulations, i.e., performing background checks, the only question ripe for review is whether the Executive Branch may constitutionally investigate the backgrounds of court personnel prior to their participation in a case involving classified information. Only if the Justice Department actually performed a security check on Judge Wiseman's court personnel and denied one or more of them clearance would the final authority issue require judicial resolution.

We analyze the separation of powers issue first by referring to the methods for protecting classified information employed by the special Foreign Intelligence Court and the Legislative Branch — the methods which Congress and Chief Justice Burger seemed to have had in mind in adopting the security provisions at issue here. We will explain those analogous procedures for the light they shed on the separation of powers question presented in the instant case. In the case of the Foreign Intelligence Court and the Legislative Branch, the Court and Congress respectively appear to retain final authority over the security clearance process after background checks are performed.

The legislative history of section 9 is sparse, and states only that Congress based that section on a similar provision under the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1803(c) (1982) ("Surveillance Act"). *See* S. Rep. No. 823, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4294, 4305. Congressional committees drafted and developed both provisions to delegate rulemaking authority for security procedures to a panel of the Chief Justice and three na-

tional security executive officials. The security procedures established by Chief Justice Burger for the special court[3] created under the Surveillance Act "to hear applications for and grant orders approving electronic surveillance anywhere within the United States," provide, in pertinent part, that court personnel

> shall undergo appropriate background investigation by the Federal Bureau of Investigation under the standards established by Director of Central Intelligence Directive No. 1/14 . . . or successor directives as concurred in by the Attorney General. These personnel shall not have access to classified information unless they have received *a security clearance determined appropriate by the court* in consultation with the Attorney General and the Director of Central Intelligence. All court personnel having access to court records shall sign appropriate security agreements. If a question concerning the security clearance of court personnel is raised subsequent to appointment, *the matter shall be referred to the court* which may consult the Attorney General and the Director of Central Intelligence regarding its security significance before taking such action as it deems appropriate.

Foreign Intelligence Surveillance Act Security Procedures ¶ 4, *reprinted in* Implementation of the Foreign Intelligence Surveillance Act, H.R. Rep. No. 558, 96th Cong., 1st Sess. 8 (1979) (emphasis added). The security procedures promulgated

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[3] The surveillance statute states in pertinent part:

> The Chief Justice of the United States shall publicly designate seven district court judges from seven of the United States judicial circuits who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act. . . .

50 U.S.C. § 1803(a)(1982).

pursuant to the Surveillance Act demonstrate that Congress, in analogous circumstances, has subjected the Judiciary, in this case the Surveillance Court, to security measures designed and administered by the Department of Justice.

The Legislative Branch also has delegated responsibility for safeguarding the flow of classified information. The Senate Resolution establishing the Select Committee on Intelligence states that employees of the Committee, or persons performing services for or at the Committee's request, cannot have access to classified information unless they agree to be bound by the Committee's confidentiality requirements. *See* S. Res. 400, 94th Cong., 2d Sess. § 5(b) (1976), *reprinted in* 122 Cong. Rec. 4755 (1976). Further, before gaining access to classified materials, they must "receive[] an appropriate security clearance as determined by such committee in consultation with the Director of Central Intelligence." *Id.* This practice is followed by the House of Representatives as well. There, the Permanent Select Committee on Intelligence performs the equivalent function of the Senate Committee,[4] and has chosen to be guided by identical security procedures. *See* Rules of the House of Representatives, 101st Cong., Rule XLVIII, § 5, at 30 (rev. ed. 1989).

It is evident from both Houses' method of protecting classified information that the Legislative Branch has determined that the participation of the Executive Branch in designing and administering security measures is not in itself an intrusion that rises to the level of an unconstitutional interference with its legislative function. In accommodating the interests of the Judicial and Executive Branches in the instant case, we are influenced by the accommodation offered by the legislative committees as well as that offered by the Surveillance Court under

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[4] Section 2(a) of Rule XLVIII of the Rules of the House of Representatives states that "[t]here shall be referred to the select committee all proposed legislation, messages, petitions, memorials, and other matters relating to [intelligence]. . . ."

the Surveillance Act described above. In making this accommodation, the district courts retain the same level of protection that the Surveillance Court and legislative committees retain against the possibility of overly intrusive inquiries which the Executive might engage in pursuant to its investigation of courtroom personnel.

III

The accommodation of the interests of the three branches mentioned above has its roots in the historical deference paid to the Executive on issues of national security. For example, in *Totten v. United States,* 92 U.S. 105, 106 (1875), the Court recognized the power inherent in the Executive, through the President, to make contracts with secret agents to "enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy" in times of war. Recognizing the President's power to make such contracts, the Court stated that courts of justice — being open to the public — should not be used for trials

> which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a dimilar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Id. at 107. Similarly, by recognizing the need for secrecy in the area of foreign relations, the Court has deferred to the judgment of the Executive to preserve national security and to guard

against the unwanted dissemination of political and military secrets:

> [E]ven if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (citations omitted); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("Secrecy in respect of information gathered by [confidential sources of information] may be highly necessary, and the premature disclosure of it productive of harmful results."); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — 'the political' — Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

Clearly the indictment of Major Smith, a member of the "Intelligence Support Activity," for stealing weapons and ammunition from the United States Government, implicates the broad authority of the Executive Branch to exercise its discretion in matters that touch national security and foreign affairs.

IV

District Judge Wiseman's concerns about preserving the judiciary from unwarranted encroachment by co-equal branches are firmly rooted in the Constitution and Supreme Court precedents. Under no circumstances should the Judiciary become the handmaiden of the Executive. The independence of the Judiciary must be jealously guarded at all times against efforts by prosecutors to erode its authority. The Constitution commands that the " 'judicial power of the United States' must be reposed in an independent Judiciary," *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982), "free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 848 (1986) (quoting *United States v. Will,* 449 U.S. 200, 218 (1980)). However, the Supreme Court also has confirmed the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality." *Snepp v. United States,* 444 U.S. 507, 509 n.3 (1980). Although permissible measures taken to satisfy this compelling interest would not include those that cause "the encroachment or aggrandizement of one branch at the expense of the other," *Buckley v. Valeo,* 424 U.S. 1, 122 (1976) (per curiam), the requirement of the Burger regulations that courtroom personnel be subject to background checks before gaining access to classified information does not in itself threaten such a result. Such a requirement affecting law clerks, secretaries and bailiffs is not closely related to the deliberative process because these individuals do not and should not decide cases; thus it only mildly intrudes into the manner in which federal judges conduct business. *See In re United States Department of Justice,* No. 87-1205, slip.op. at 4 (4th Cir. Apr. 7, 1988) (unpublished disposition) (in issuing writ of *mandamus* that required security clearances for courtroom staff in civil case, court concluded that contempt or disclosure dilemma justified "minimally intrusive" requirement of routine security clearance). Under section 4 of the Burger regulations,

district courts retain sufficient power to preclude the Executive from engaging in procedures that intrude upon both the judicial function and, potentially, the privacy interests of court personnel. Proper administration of the regulations is therefore consistent with the doctrine of separation of powers.

V

We therefore hold that the Executive Branch may conduct reasonable background investigations, subject to district court review, of judicial personnel before such personnel are cleared to work on a case involving classified information. The security clearance procedures established under the Burger regulations do not on their face, or as applied in this case so far, violate principles of separation of powers. Because the District Court precluded the Executive from performing any initial background checks in this case, the propriety of the checks themselves is not at issue.

Accordingly, we **reverse** the judgment of the court below. The case is **remanded** to the District Court with instructions to permit the Executive Branch to perform background checks as described in section 4 of the Burger regulations.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

No. 3-88-00147

United States of America

v.

Michael Lynn Smith

N. Neese Bagwell, Bagwell, Bagwell, Bagwell, Parker, Riggins & Kennedy, Clarksville, Tenn., and Thomas Buchanan, Washington, D.C., for Michael Lynn Smith.

Michael C. Olmsted, Trial Atty., U.S. Dept. of Justice, Washington, D.C., for the U.S.

Feb. 10, 1989

ORDER

The United States moves for reconsideration of the Protective Order issued by this Court on January 10, 1989. *See United States v. Michael Lynn Smith,* No. 3-88-00147 (Jan. 10, 1989) (protective order). Paragraph Six of this Order designates certain court staff who will have access to classified information regarding the trial of Michael Lynn Smith without first obtaining security clearances from the Department of Justice. The United States asserts that this provision violates § 4 of the security procedures established pursuant to § 9 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. IV (1985). This Court holds that § 4 of the security procedures itself violates the Constitution by subjecting the judiciary to undue interference by the executive branch.

CIPA establishes guidelines for handling classified information that comes into the custody of federal courts during criminal trials or appeals. Section 9 requires the Chief Justice of

the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, to prescribe procedures for avoiding unauthorized disclosure of classified information. Section 4 of these procedures provides in part:

> No person appointed by the court or designated for service therein shall be given access to any classified information in the custody of the court, unless such person has received a security clearance as provided herein and unless access to such information is necessary for the performance of an official function.

Section 4 violates judicial independence and the separation of powers. It gives the executive branch veto power over a federal judge's choice of court personnel. The executive unilaterally conducts the investigations, establishes the clearance standards, and determines who meets or does not meet those standards.

This interferes with the very core of the judicial process. A "court" is more than a judge; it is a tightly integrated unit composed of the judge and those he carefully selects to assist him in fulfilling his duties. The court staff subjected to executive scrutiny through § 4 are in a very real sense an extension of the judge himself. The CIPA procedures thus invite executive officials into a court's chambers and authorize them to dictate to federal judges the manner in which they conduct their business.

An independent judiciary is a cornerstone of our republic. Those who first shed their blood for this country listed as one of their grievances against the English monarch that "[h]e has made Judges dependent on his Will alone, for the tenure or their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11 (U.S. 1776). This grievance found satisfaction in the Constitution, which grants federal judges life tenure and salary protection and "commands that the independence of the Judiciary be jealously guarded. . . ." *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 60 (1982).

Our Founders recognized that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." The Federalist No. 78, at 466 (A. Hamilton) (Mentor ed. 1961). They also realized that the integrity of "the weakest" branch requires especially vigilant protection. *See id.* at 465-66 (The judiciary "can never attack with success either of the other two [branches]; and . . . all possible care is requisite to enable it to defend itself against their attacks."). "[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." *Id.* at 466. *See also* The Federalist No. 48, at 308 (J. Madison) (Mentor ed. 1961) ("It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."). Section 4 of the CIPA procedures violates these fundamental principles.

The insidious evil envisioned by § 4 is its effect on the impartiality of the Court and the public perception and appearance of impartiality. If the Justice Department can investigate the tax returns and personal lives of anyone in the Court's employ, there is the potential for intimidation and unjustified favorable treatment. Even if this potential does not exist, the appearance of its possibility undermines public confidence in absolute impartiality. When the Department of Justice through a United States Attorney appears in this Court in a criminal case, it is as a *litigant* — nothing more, nothing less. The United States Attorney is entitled to no more consideration or deference than the defense attorney. Any other attitude emasculates the presumption of innocence. Allowing the Department of Justice *any* voice in selection of court personnel dealing with a case in which it is a party offends the most elementary notions of fair play and impartial justice.

The United States relies upon an unpublished decision of the Fourth Circuit Court of Appeals. *See In re United States Department of Justice,* No. 87-1205 (4th Cir. Apr. 7, 1988). The court in that case issued a writ of mandamus requiring the court below to delay the production of classified information in a civil case until all members of the courtroom staff having access to the information obtained security clearances. "The central question properly before us is whether the national interest in preventing unauthorized disclosure of classified material demands reasonable deference from all branches of the government. We are persuaded it does." *Slip op.* at 3.

The Fourth Circuit's view of "reasonable deference" is dangerous precedent. This Court agrees that this government "has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality. . . ." *Snepp v. United States,* 444 U.S. 507, 509 n.3 (1980). But the judiciary is a coequal branch of this government. Due deference for national security does not require that the judiciary tolerate incursions into its legitimate and constitutionally established functions and prerogatives.

This Court resents the implicit assertion that it is unable or unwilling to protect our country from harmful disclosures without abdicating authority to the executive. The judiciary is concerned with national security no less than the other branches. Federal judges in fact sacrifice much more lucrative work to serve their country. And they are competent to take measures to protect against harmful disclosures of classified information.

This Court in fact *has* deferred to national security interests by subjecting itself and the parties to the directives contained in the Protective Order. But it has deferred on its own terms, not on those dictated to it by the executive.

This Court has reconsidered the Protective Order at issue. The Order shall not be amended.[1] This Court will not tolerate the blatant incursion on the judicial decision-making process requested by the Justice Department. The independence of this Court will not be compromised.

/s/ Thomas A. Wiseman, Jr.
Chief Judge

---

[1] The United States also suggests that this Court require defense personnel to obtain security clearances. Section 5 of the CIPA procedures governs persons associated with the defense. This Court finds no authority in that section for requiring submission to a security clearance as a prerequisite to representation of a defendant in a case involving classified information. *Accord United States v. Jolliff*, 548 F. Supp. 232, 233 (D. Md. 1981). This Court questions whether such a requirement, if it existed, would violate defendant's sixth amendment right to counsel.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

No. 3-88-00147

United States of America,

v.

Michael Lynn Smith

This document was entered on the docket in
compliance with Rule 55, FRCrimP, on 1/10/89

PROTECTIVE ORDER

The Court having considered the motion of the government for a protective order, the declaration in support thereof, and all other papers and proceedings related thereto,

It is hereby ORDERED that, pursuant to section 3 of the Classified Information Procedures Act, 18 U.S.C. App. IV, §3, the following Protective Order is entered:

1. The Court finds that this case will involve information that has been classified in the interest of national security. The storage, handling and control of this information will require special security precautions. The purpose of this Order is to establish procedures that must be followed by counsel and the parties in this case. These procedures will apply to all *pretrial* matters concerning this case and the trial thereof and may be modified from time to time by further order of the Court acting under its inherent supervisory authority to ensure a fair and expeditious trial.

2. *Definitions.* The following definitions shall apply to this Order:

a. "Classified information" shall mean:

(i) any document or information which has been classified by any executive agency in the interests of national security or pursuant to Executive Order 12356 as "confidential," "secret," "top secret" or "sensitive compartmented information,"

(ii) any document or information now or formerly in the possession of a private party which (A) has been derived from information from the United States government that was classifed and (B) has subsequently been classified by the government pursuant to Executive Order 12356 as "confidential," "secret," "top secret" or "sensitive compartmented information."

b. "Document" shall mean any material containing information. The term "document" shall include, without limitation, letters, reports, summaries, memoranda, notes, communications, telexes, cables, telecopies, reports, photgraphs, charts, graphs, maps, invoices, accountings, worksheets and messages. The term "document" also shall include, without limitation, all recordings of information on magnetic, electronic or optical media such as audio or video tapes, computer tapes or disks, films and all manner of electronic data processing storage.

c. "Access to classified information" means having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information.

3. In accordance with the provisions of CIPA and the Security Procedures promulgated by the Chief Justice of the United States pursuant to that Act, this Court designates James Londergin and Charles Alliman as Court Security Officers for this case. They are designated for among other purposes, providing security arrangements necessary to protect from unauthorized disclosure, any classifed information or document made available in connection with this case. Defense counsel

shall seek guidance from the Court Security Officers with regard to appropriate storage and use of classifed information.

4. *Filing of Papers by Defendant.* Any pleading or other document filed by defendant shall be filed under seal with the Court through the Court Security Officer. The Court Security Officer shall promptly examine the pleading or document and, in consultation with representatives of the appropriate agencies, determine whether the pleading or document contains classified information. If the Court Security Officer determines that the pleading or document contains classified information, he shall ensure that that portion of the document, and only that portion, is marked with the appropriate classification marking and remains under seal. All portions of all papers filed by defendant that does not contain classified information, shall be immediately unsealed by the Court Security Officer and placed in the public record. The Court Security Officer shall immediately deliver under seal to the Court any pleading or document to be filed by the defendant that contains classified information; the Court shall then direct the clerk to enter on the docket sheet the title of the pleading or document, the date it was filed, and the fact that it has been filed under seal with the Court Security Officer.

5. *Filing of Papers By The Government.* Only the portions of pleadings or documents filed by the government containing classified information shall be filed under seal with the Court through the Court Security Officer.

6. *Protection Of Classified Information.* The Court finds that, in order to protect the classified information involved in this case, no person except the defendant, counsel for defendant, employee of counsel for defendant or defense witness shall have access to the classified information involved in this case. No counsel for defendant, employee of counsel for defendant or defense witness shall have access to any classified information in this case unless that person shall first have:

a. received an approval for access to the appropriate level of classifiction from the Court on a need to know basis; and

b. signed the Memorandum of Understanding in the form attached hereto agreeing to comply with the terms of this Order.

The Court designates the following persons on its staff as authorized to have access to classified information in this case:

Susan Armor, Secretary

Joyce Merritt, Courtroom Deputy

John Tummel, Court Reporter

Alex Fardon, Law Clerk

Each of the above named persons shall execute the Memorandum of Understanding and file the same with the Court. No other persons, Clerk's office nor in the Judge's chambers, shall have such access.

7. *Access To Classified Information.* Defendant, counsel for defendant, employees of counsel for defendant and witnesses accompanied by counsel for defendant shall have access to classified information only as follows:

a. All classified information produced by the government to defendant in discovery or otherwise, and all classified information possessed, created or maintained by defendant, shall be stored, maintained and used only in such place and under such circumstances as shall be approved by the Court after receiving the recommendation of the Court Security Officer.

b. Defendant, counsel for defendant and employees of counsel for defendant shall have free access to the classified information made available to them and shall be allowed to take notes and prepare documents with respect to those materials; but such notes, documents, and materials shall be subject to this Protective Order.

c. No person, including defendant, counsel for defendant, employee of counsel for defendant or defense witness, shall copy or reproduce any classifed information in any manner or form, except with the approval of the Court Security officer or in accordance with procedures established by the Court Security Officer.

8. *Classified Information Procedures Act.* Procedures for the public disclosure of classified information by the defense shall be those sections 5 and 6 of the Classified Information Procedures Act, 18 U.S.C. App. IV ("CIPA"). No classifed information may be disclosed by the defense except:

a. To the Court and court personnel above designated, and to goverment attorneys and their agents and employees identified by the Court Security Officer as holding proper approvals for access to classified information;

b. To representatives of the agency or department originating the classified information who have been identified by the Court Security Officer as holding proper security clearances and having the need to know the classified information;

c. In accordance with the procedures of CIPA and the procedures established by the Court Security Officer; and

d. To persons who have been authorized to have access to classified information pursuant to this Order or to CIPA.

9. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible reference for criminal prosecution. Persons subject to this Order are advised that direct or indirect unauthorized disclosure, retention or negligent handling of classified documents or information could cause serious damage, and in some cases exceptionally grave damage, to the national security of the United States or may be

used to the advantage of a foreign nation against the interests of the United States.

10. All classified information to which defendant, counsel for defendant, employee of counsel for defendant or defense witness has access in this case is now and will remain the property of the government. Any defendant, counsel for defendant, employee of counsel for defendant or defense witness shall return all classified information in their possession obtained through discovery from government in this case, or for which they are responsible because of access to classified information, upon demand of the Court Security Officer. The notes, summaries and other documents prepared by the defense that do or may contain classified information shall remain at all times in the custody of the Court Security Officer for the duration of this case. At the conclusion of this case, all such notes, summaries and other documents are to be destroyed by the Court Security Officer in the presence of counsel for defendant.

11. A copy of this Order shall be issued forthwith to counsel for defendant who shall be responsible for advising defendant, employees of counsel for defendant and defense witnesses of the contents of this Order. Defendant, counsel for defendant, employee of counsel for defendant and defense witness to be provided access to classified information shall execute the Memorandum Of Understanding described in paragraph 6 of this Order and counsel for defendant shall file executed originals with the Court and the Court Security Officer and serve an executed original of such document upon the government. The execution and filing of the Memorandum of Understanding is a condition precedent for defendant, counsel for defendant, employee of counsel for defendant and defense witness to have access to classified information.

/s/ Thomas A. Wiseman, Jr.
Chief Judge

January 9, 1989.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

No. 3-88-00147

United States of America,

v.

Michael Lynn Smith

MEMORANDUM OF UNDERSTANDING

I have received, read and understand the Protective Order entered by the United States District Court for the Middle District of Tennessee on January 9, 1989, in this case and I agree to comply with its provisions and to provide the information requested below. I understand that direct or indirect unauthorized disclosure, retention or negligent handling of classified documents or information could cause serious damage, and in some case exceptionally grave damage, to the national security of the United States or may be used to the advantage of a foreign nation against the interests of the United States.

Name:

Social Security No.:

Date and Place of Birth:

_____

Signature

_____

Date

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5182

United States of America
Plaintiff-Appellant,

v.

Michael Lynn Smith
Defendant-Appellee.

ORDER

(Filed: May 7, 1990)

THE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND
AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE

Amicus Curiae

BEFORE: MERRITT, Chief Judge; KRUPANSKY, Circuit Judge; GRAHAM, District Judge.*

Upon consideration of the appellee's motion to stay the mandate in the above cause,

It is ORDERED that the motion be and it hereby is GRANTED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Leonard Green, Clerk

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*The Honorable James L. Graham, District Judge for the Southern District of Ohio, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5182

United States of America
Plaintiff-Appellant,

v.

Michael Lynn Smith
Defendant-Appellee.

ORDER

(Filed: June 19, 1990)

THE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND
AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE

Amicus Curiae

BEFORE: MERRITT, Chief Judge; KRUPANSKY, Circuit Judge; GRAHAM, District Judge.*

Upon consideration of the appellee's motion to further stay the mandate,

It is ORDERED that the motion be and it hereby is GRANTED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Leonard Green, Clerk

---

*The Honorable James L. Graham, District Judge for the Southern District of Ohio, sitting by designation.

APPENDIX E

U.S. Const., art. II:

Section 1. The executive Power shall be vested in a President of the United States of America. . . .

Section 3. . . . he shall take Care that the Laws be faithfully executed, ...

U.S. Const., art. III:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;

***

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Classified Information Procedures Act (CIPA), 18 U.S.C. App. IV:

§ 3. Protective orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

§ 7. Interlocutory appeal

(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decison shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

§ 9. Security procedures

(a) Within one hundred and twenty days of the date of the enactment of this Act, the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

The Foreign Intelligence Surveillance Act (FISA) § 103, 50 U.S.C.A. § 1803 (Supp. 1990):

(c) Expeditious conduct of proceedings; security measures for maintenance of records

Proceedings under this Act shall be conducted as expeditiously as possible. The record of proceedings under this Act, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence.

Security Procedures Established Pursuant to Public Law No. 95-511, 92 Stat. 1783, by the Chief Justice of the United States for the Foreign Intelligence Surveillance Court [reprinted in H.R. Rep. No. 96-588, 96 Cong., 1st Sess. 7,8 (1979)]:

4. *Appointment of Personnel . . .*

Personnel appointed by or designated for service to the court, shall undergo appropriate background investigation by the Federal Bureau of Investigation under the standards established by Director of Central Intelligence Directive No. 1/14, dated 13 May 1976, or successor directives as concurred in by the Attorney General. These personnel shall not have access to classified information unless they have received a security clearance determined appropriate by the court in consultation with the Attorney General and the Director of Central Intelligence. All court personnel having access to court records shall sign appropriate security agreements. If a question concerning the secruity clearance of court personnel is raised subsequent to appointment, the matter shall be referred to the court which may consult the Attorney General and the Director of Central Intelligence regarding its security significance before taking such action as it deems appropriate.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 88-80

Washington, DC
April 12, 1988
10:00 A. M.

United States of America,

versus

John M. Poindexter, Oliver L. North,
Richard V. Secord, Albert Hakim,
Defendants

TRANSCRIPT OF PRETRIAL HEARING BEFORE
THE HONORABLE GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

Appearances:

For the Government: Lawrence Walsh, Esq.
Independent Counsel
By: Herbert J. Stern
555 13th Street, N.W.
Washington, D. C. 20004

For the Defendants: Fulbright & Jaworski, Esqs.
Attorneys for Deft. Poindexter
By: Richard W. Beckler, Esq.
1150 Connecticut Avenue, N.W.
Washington, D. C. 20036

Williams & Connolly, Esqs.
Attorneys for Deft. North
By: Brendan Sullivan, Esq.
By: Barry S. Simon, Esq.
Hill Building
839 17th Street, N.W.
Washington, D. C. 20036

Sharp, Green & Lankford, Esqs.
Attorneys for Deft. Secord
By: James E. Sharp, Esq.
1800 Massachusetts Avenue, N.W.
Washington, D. C. 20036

(111) [Mr. Simon:] material. Now we're told it can only be done in a separate facility and under very special conditions.

I believe that in terms of the strict trial preparation material such as typing and location really pales in comparison to restrictions on the ability to meet with, interview, prepare witnesses and with access and when we're talking about preparing a case we're really talking about documentary material and access to witnesses and their knowledge and it's there that the proposed order really provides the greatest restrictions and we're saying particularly in this case when there are witnesses around the world, many of whom may have clearances with foreign governments or private individuals but certainly don't hold security clearances with the United States Government. The protective order in paragraph six makes it absolutely clear that there can be no conversations with any of those people until they receive a security clearance and sign a memo of understanding which requires a provision of a wealth of background information. I don't know if the court has seen the forms that the defense counsel previously filled out and which anybody — I guess probably court staff are required to fill out those forms but —

The Court: Well, let me tell you about that. None of my staff were required to. I asked them to. And they have applied.

I asked them to because it did not seem **(112)** to me that there was any reason why I shouldn't remove any question with respect to my staff though there's no authority that could make me do it and everybody was willing to do it. So we had no problem.

Mr. Simon: That may not be true with respect to witnesses.

The Court: I'm exempt so I didn't have the process, but one reason I have felt it is inappropriate to make defense lawyers do it is it seems to me that those forms present to the government, who is prosecuting the case, a large number of very intimate health and background facts about individual lawyers that normally is not in the discourse of ordinary trials. We don't require lawyers to undress in front of the government before they can try a case. And I have not felt there's anything in the statute that authorizes lawyers having to do it. I have felt that you gentlemen because you had all applied at least at — one or more of the top lawyers in each group has applied, the way to accomodate it is not a question of law but say as long as one has been cleared and takes responsibility that's good enough for me and that's where we stop. That isn't a legal decision. It's just a practical decision. You already have clearances, by and large and there shouldn't be any problem about it.

But to the extent that your preparation is — —

APPENDIX G

U.S. Department of Justice

Washington, D.C. 20530

Jan. 17, 1989

Thomas Buchanan, Esquire
Heron, Burchette, Ruckert & Rothwell
Suite 700
1025 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

Dear Mr. Buchanan:

I write this letter to correct the misstatements that you make in your letter of January 10, 1988. You state that we have known for over six months that you were representing Major Michael Smith. That is simply not the case. Until two weeks ago, you had advised us that, you would represent Michael Smith only once you had been paid, and until that time, you were merely providing informal advice to Reese Bagwell on CIPA issues.

A few weeks ago, you advised me that you had resolved the money matters that had kept you from representing Michael Smith, and that you would like a clearance as soon as possible. Within two days, James Londergin, the nominated court security officer, contacted you to ascertain the necessary information to process your request for access.

Several days later, I told you that the clearance procedure was progressing quickly, but until a Protective Order had been entered by Judge Wiseman and the attached Agreement had been signed, the government could not produce classified documents to you. I further stated that your clearance might be delayed until you discussed with the security officers your recent trip to Russia. You stated your understanding of that pro-

cedure. I wrote to you on January 5, 1989, pointing out that you had still not entered your appearance on behalf of Michael Smith, so that no clearance had been granted. A copy of that letter is enclosed.

On January 10, 1989, I advised you that I had learned that a Protective Order had been signed, and that, if it were a satisfactory order from the government's point of view, you could expect to be granted access to classified information expeditiously. We have reviewed the Protective Order and we have found that it is not satisfactory because, *inter alia,* it does not permit the government to undertake background checks of court personnel in order to determine whether clearances should be given to them. Accordingly, we have filed a Motion for Reconsideration on that issue. I enclose a courtesy copy of that Motion.

We have not delayed the processing of your clearance at all. Classified information will be disclosed in connection with this trial only in accordance with CIPA. CIPA provides for the entry of a Protective Order before classified information can be disclosed by the government. The government has asked Judge Wiseman to reconsider the terms of that Order, which, itself, has been entered for only three days.

On another subject, I was advised today that you have filed several motions in Nashville, and that on the Certificate of Service you certify that on January 5, 1989, you mailed copies of the motions to me. When we spoke earlier this week, you told me that you had mailed the motions to Reese Bagwell, and that he would serve and file the motions. Mr. Bagwell, for his part, told United States Attorney Joe Brown that he had served Mr. Brown by mail with the request that he forward copies to me. Neither Mr. Brown nor I have received service copies of the motions.

Moreover, we have spoken twice since you made your certification, and both times you denied having tried to serve me directly. You told me that you thought that Mr. Bagwell would

accomplish service. On Friday, January 13, 1989, Joe Brown was given a copy by the Court personnel only because the Judge ordered that a copy be provided to him.

From this point on, I expect to be served with motions, particularly when you certify that you have made such service on me.

Sincerely yours,
William C. Hendricks III
Chief, Fraud Section

By: /s/ Michael C. Olmsted
Trial Attorney

cc: Honorable Thomas A. Wiseman, Jr.
U.S. District Judge
824 U.S. Courthouse
Nashville, Tennessee 37203

HERON, BURCHETTE, RUCKERT & ROTHWELL

Suite 700
1025 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

(202) 337-7700
TWX 710-822-9270
FAX (202) 898-7723

January 10, 1989

Michael Olmsted, Esquire
Trial Attorney
P.O. Box 28188
Central Station
Washington, D. C 200038

Re: *United States of America v. Michael Lynn Smith,* United States District Court for the Middle District of Tennessee, Criminal No. 3-88-00147

Dear Mike:

I am writing concerning the progress of my security clearance. As you have known for over six months now, based on my conversations with you and Ted Greenberg, Deputy Chief of the Fraud section, I represent the defendant, Major Michael Smith, in the above-captioned case, along with Reese Bagwell of Nashville, Tennessee. Notwithstanding your awareness of my representation of Major Smith, and therefore my obvious need for a security clearance to discuss the case with him because of the involvement of classified information, I still do not have a security clearance. Without a security clearance I not only cannot adequately defend my client, but I cannot file a notice of intent to use classified information pursuant to Section 5 of the Classified Information Procedure Act, 18 U.S.C. App IV.

Being that I am currently cleared for top secret, special compartmented information because of my representation of other

clients in cases with the Department of Justice, a clearance for this case could be done almost immediately. The government's failure to provide me with a clearance up to this point has clearly prejudiced my client in light of the fact that his trial is scheduled for February 9, 1989. Please treat this letter as a formal request for a clearance for myself, and notice that in the event a clearance is not provided shortly, I will be compelled to appeal to the district court for relief.

Thank you for your attention to this matter.

Sincerely,

/s/ Thomas M. Buchanan

TMB/jp

cc: Honorable Thomas A. Wiseman, Jr.
U.S. District Judge
Middle District of Tennessee
824 U.S. Courthouse
Nashville, Tennessee 37203

Reese Bagwell

HERON, BURCHETTE, RUCKERT & ROTHWELL

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FAX (202) 898-7723

January 24, 1989

Michael Olmsted, Esquire
Trial Attorney
P.O. Box 28188
Central Station
Washington, D.C. 200038

Re: *United States of America v. Michael Lynn Smith,* United States District Court for the Middle District of Tennessee, Criminal No. 3-88-00147

Dear Mike:

I am writing in response to your letter of August 16, 1988. In that letter you dispute my contention, with regard to the failure of the Department of Justice to grant me a security clearance, that you have known that I have represented Major Michael Smith for six months. The basis for your position is a comment I made, in confidence and off the record, that I might not be able to represent Major Smith if he could not fund the litigation. I never, however, suggested that I was not representing him at that time, or that I only represented him informally on CIPA matters.

I am amazed at your reasoning, particularly considering the correspondence that I and my co-counsel, Reese Bagwell, have had with you dating back to June 22, 1988, well over six months ago. I have attached that correspondence for your edification.

In each letter it clearly indicates that I am counsel for Major Smith. In fact, in a letter from you to Mr. Bagwell dated July 5, 1988, you specifically acknowledge my representation of Major Smith, and, interestingly enough, you also wrote that "Mr. Buchanan does not currently possess the right of access to any classified information that your client may communicate to you."

As to your contention that I cannot be cleared until the court signs a CIPA Protective Order satisfactory to the government, I submit that there is no authority, under CIPA or otherwise, for such a position. Section 3 of CIPA, which allows the government to seek a protective code to protect against the disclosure of classified information, applies only to classified information disclosed by the government to a defendant during discovery. It in no way affects the government's obligation to clear defense counsel so that he may discuss the case with his client, and adequately defend him. Your position with regard to my clearance is belied by your treatment of Mr. Bagwell, who was cleared months ago. It is clear that you have arbitrarily decided to clear only one attorney for tactical reasons, and that there is no legal basis for your position.

Finally, I apologize for any delay in your failure to receive any pleadings in a timely manner. I forwarded these pleadings to Mr. Bagwell on December 30, 1988, with the certificate of service in blank. I authorized him to sign my name. Apparently, Mr. Bagwell wanted to send you filed copies of the pleadings, but when he filed the pleadings they were placed under seal by the clerk's office due to confusion over the application of the court's protective order.

Again, I apologize for the delay and inconvenience.

Sincerely,

/s/ Thomas M. Buchanan

TMB/jp

cc: Honorable Thomas A. Wiseman, Jr.
U.S. District Judge
Middle District of Tennessee
824 U.S. Courthouse
Nashville, Tennessee 37203

No. 90-58

JOSEPH F. SPANIOL
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL LYNN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether security procedures prescribed by the Chief Justice of the United States under the Classified Information Procedures Act violate separation of powers principles by restricting disclosure of classified information to court personnel who have received a security clearance from the Executive Branch.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967)	9
Allen v. *Wright*, 468 U.S. 737 (1984)	7
Bowers v. *United States Dep't of Justice*, 690 F. Supp. 1483 (W.D.N.C. 1987)	11
CFTC v. *Schor*, 478 U.S. 833 (1986)	8, 9
Chicago & S. Air Lines v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948)	10
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983)	8
Doremus v. *Board of Education*, 342 U.S. 429 (1952)	7
Oetjen v. *Central Leather Co.*, 246 U.S. 297 (1918)	10
O'Shea v. *Littleton*, 414 U.S. 488 (1974)	8
Mistretta v. *United States*, 109 S. Ct. 647 (1989)	9, 11
Snepp v. *United States*, 444 U.S. 507 (1980)	10
United States v. *Curtiss-Wright Export Co.*, 299 U.S. 304 (1936)	10
United States v. *Nixon*, 418 U.S. 683 (1974)	9
United States v. *United States District Court*, 407 U.S. 297 (1972)	10
United States v. *Yunis*, 867 F.2d 617 (D.C. Cir. 1989)	10
United States Dep't of Justice, In re, No. 87-1205 (4th Cir. Apr. 7, 1988)	11
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952)	9

Constitution and statutes:	Page
U.S. Const. Art. III	7
Classified Information Procedures Act, 18 U.S.C. App. at 706:	
§ 3, 18 U.S.C. App. at 706	2
§ 7(a), 18 U.S.C. App. at 706	7
§ 9, 18 U.S.C. App. 708-709	4
Section 2	3-4
Section 4	11, 13
§ 9(a), 18 U.S.C. App. at 709	3, 12
Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783, 50 U.S.C. 1801 note	13
§ 101-111, 50 U.S.C. 1801-1811	6
§ 103(c), 50 U.S.C. 1803(c)	12
18 U.S.C. 922	2
18 U.S.C. 924	2
18 U.S.C. 2314	2
18 U.S.C. 2315	2
26 U.S.C. 5861(d)	2
26 U.S.C. 5861(i)	2
Miscellaneous:	
The Federalist, No. 47 (J. Cooke ed. 1961)	9
H.R. Rep. No. 558, 96th Cong., 1st Sess. (1979)	13
H.R. Rep. No. 831, 96th Cong., 2d Sess. Pt. 2 (1980)	13
S. Rep. No. 823, 96th Cong., 2d Sess. (1980)	12

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-58

MICHAEL LYNN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 899 F.2d 564. The memorandum opinion of the district court (Pet. App. 13a-17a) is reported at 706 F. Supp. 593.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1990. The petition for a writ of certiorari was filed on July 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a United States Army officer formerly assigned to an intelligence support unit. On September 14, 1988, he was indicted by a federal grand jury in the Middle District of Tennessee on five counts charging him with interstate transportation of stolen goods, in violation of 18 U.S.C. 2314; concealment and storage of stolen goods, in violation of 18 U.S.C. 2315; interstate transportation of stolen firearms, in violation of 18 U.S.C. 922 and 924; possession of an unregistered silencer, in violation of 26 U.S.C. 5861(d); and possession of a silencer without a serial number, in violation of 26 U.S.C. 5861(i).

The offenses allegedly were committed between 1981 and 1983 while petitioner was a member of the Intelligence Support Activity, an Army Unit that performs classified missions. The indictment alleged that petitioner and others used Army documents and money to purchase firearms and goods that they kept for themselves while falsifying Army records to make it appear that other items (*e.g.*, ammunition and targets) had been purchased and consumed by the Army. During a consent search of petitioner's house, Army investigators found more than 200 firearms, having a total value of more than $60,000. See Gov't C.A. Br. 3.

1. Because portions of petitioner's statements to Army investigators, as well as certain relevant documents, contain classified information, the government submitted to the district court a proposed protective order safeguarding such information pursuant to Section 3 of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. at 706.[1] The aspect of

[1] Section 3 of CIPA provides: "Upon motion of the United States, the court shall issue an order to protect against the dis-

the proposed protective order at issue here concerns the procedures for obtaining security clearances for the district court's support staff.

Section 9(a) of CIPA provides that the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures under CIPA that will take effect 45 days after they are reported to Congress. 18 U.S.C. App. at 708. Pursuant to Section 9(a), Chief Justice Burger issued security procedures applicable to CIPA cases on February 12, 1981. Section 4 of those security procedures provides:

> *Personnel Security—Court Personnel.* No person appointed by the court or designated for service therein shall be given access to any classified information in the custody of the court, unless such person has received a security clearance as provided herein and unless access to such information is necessary for the performance of an official function. A security clearance for justices and judges is not required * * *.
>
> The court shall inform the court security officer or the attorney for the government of the names of court personnel who may require access to classified information. That person shall then notify the Department of Justice Security Officer, who shall promptly make arrangements to obtain any necessary security clearances and shall approve such clearances under standards of

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closure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States."

> the Executive Branch applicable to the level and category of classified information involved.
>
> * * * * *
>
> Justices, judges and cleared court personnel shall not disclose classified information to anyone who does not have a security clearance. * * *
>
> * * * * *
>
> Any problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action.

18 U.S.C. App. at 709. In accordance with these procedures, the government's proposed protective order required "such courtroom personnel as the [district] court requires for its assistance" to submit fingerprints and standard security forms to the court security officer to be forwarded to the Federal Bureau of Investigation.[2] Gov't C.A. Br. 4-5 & n.2. Initially, petitioner did not oppose entry of the proposed protective order, Indeed, petitioner and his counsel voluntarily signed pre-indictment nondisclosure agreements virtually identical to those contained in the proposed protective order. See Gov't C.A. Br. 5 & n.3.

2, On January 10, 1989, the district court unilaterally rejected the government's proposed protective order and entered in its place a protective order of its own. Pet. App. 18a-23a. The court's order re-

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[2] A "Court Security Officer" is provided for by Section 2 of the CIPA regulations, which describes that officer as a court-designated "individual with demonstrated competence in security matters, [who] shall, prior to designation, have been certified to the court in writing by the Department of Justice Security Officer as cleared for the level and category of classified information that will be involved." 18 U.S.C. App. at 708.

stricted disclosure of classified information to four designated members of the court's staff (a secretary, courtroom deputy, court reporter, and law clerk) and required each designated staff member to sign a court-drafted "Memorandum of Understanding" (*id.* at 24a) agreeing not to disclose classified information in an unauthorized manner. The court's order thus provided for the disclosure of classified information to court personnel without security clearances.

The district court subsequently denied the government's motion for reconsideration. In response to the government's contention that the court's protective order violated the CIPA security procedures by allowing disclosure of classified information to persons without security clearances, the court held that "[Section] 4 of the security procedures itself violates the Constitution by subjecting the judiciary to undue interference by the executive branch." Pet. App. 13a. The court concluded that requiring security clearances for court personnel handling classified information "interferes with the very core of the judicial process." *Id.* at 14a. The court said that "[t]he insidious evil envisioned by § 4 is its effect on the impartiality of the Court and the public perception and appearance of impartiality." *Id.* at 15a. "Allowing the Department of Justice *any* voice in selection of court personnel," the court said, would violate "elementary notions of fair play" and would "emasculate[] the presumption of innocence." *Ibid.* The district court expressed the belief that it had deferred to national security concerns "on its own terms, not on those dictated to it by the executive." *Id.* at 16a.

3. On interlocutory appeal pursuant to Section 7(a) of CIPA, the court of appeals reversed and remanded the case with instructions to "permit the Executive Branch to perform background checks as

described in section 4 of the Burger regulations." Pet. App. 12a. The court noted that, "[b]ecause [the district court] forbade the Department of Justice from engaging in the first step under the regulations, i.e., performing background checks, the only question ripe for review is whether the Executive Branch may constitutionally investigate the backgrounds of court personnel prior to their participation in a case involving classified information." *Id.* at 6a. "Only if the Justice Department actually performed a security check on [the district court's] personnel and denied one or more of them clearance," the court observed, "would the final authority issue require judicial resolution."[3] *Ibid.* The court held that security clearance investigations do not, on their face or as applied so far in this case, violate the constitutional separation of powers. *Id.* at 12a. The court concluded that the CIPA security regulations reasonably acommodate the need to avoid unwarranted intrusions upon the judicial function and the great deference owed to the executive branch on matters of national security. *Id.* at 9a-12a. The court noted that the security procedures under CIPA are analogous to those required of court personnel of the special Foreign Intelligence Court under the Foreign Intelligence Surveillance Act, 50 U.S.C. 1801-1811, and also to those of legislative personnel serving on congressional committees with national security oversight functions. Pet. App. 6a-9a.

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[3] The court noted, however, that the CIPA regulations require that "[a]ny problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action." Pet. App. 5a-6a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, petitioner lacks standing to assert the interests of the Judicial Branch, and those claims that petitioner might have standing to raise are not ripe for review. Accordingly, review by this Court is not warranted.

1. Article III of the Constitution, which confines the federal courts to adjudicating actual "cases" and "controversies," requires that a litigant must demonstrate some "personal injury fairly traceable to the [challenged] conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); see also *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952). The standing doctrine reflects not only constitutional limitations on the jurisdiction of federal courts, but also "embraces * * * judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights." 468 U.S. at 751.

The government's interlocutory appeal to the Sixth Circuit under Section 7(a) of CIPA presented an actual case and controversy. The district court's order would have resulted in a cognizable injury to governmental interests by releasing classified information to persons not cleared pursuant to the CIPA regulations. Petitioner, in contrast, cannot demonstrate that he will suffer any injury as a result of the decision of the court of appeals. That decision simply requires the district court's support staff to submit to the security clearance process before handling classified information. The court of appeals' mandate was not addressed to petitioner, and petitioner cannot

serve as the self-designated protector of what he perceives to be the interests of the Judicial Branch against alleged intrusion by the Executive Branch.

Petitioner asserts that requiring court personnel to submit to background checks conducted by the Executive Branch will threaten his "assurance of a fair trial before an impartial tribunal." Pet. 14. Petitioner also asserts "a vital personal interest in Article III, § 1's 'guarantee of an independent and impartial adjudication by the federal judiciary.'" Pet. 23 n.20 (quoting *CFTC* v. *Schor*, 478 U.S. 833, 848 (1986)). But petitioner does not assert that the decision of the court of appeals violates any of his constitutional rights. That is not surprising, because petitioner cannot demonstrate that the court of appeals' decision meaningfully impairs his right to a fair trial by an impartial tribunal. Instead, petitioner's claim to standing rests on a series of tenuous suppositions: first, that the required security clearances will destroy the impartiality of members of the court's staff; second, that staff members will be biased for rather than against the government as a result of the security clearance process; and third, that the biases of staff members will affect the court's conduct of the trial to such an extent that petitioner will be deprived of constitutional rights. This is precisely the kind of "abstract," "conjectural" and "hypothetical" claim of injury that this Court has held insufficient to support standing. See, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974).

At best, petitioner's claims are premature. Petitioner himself concedes (Pet. 22-23) that his acquittal "would mean that the injury to judicial independence and the appearance of a fair trial will have been

harmless *to petitioner*." Thus, absent a final judgment of conviction, any claims petitioner may have based on alleged separation of powers violations are not ripe. See generally *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967).

2. On the merits, petitioner's constitutional claim is unpersuasive. This Court has recognized that "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." *Mistretta* v. *United States*, 109 S. Ct. 647, 659 (1989). The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). See also *The Federalist* No. 47, at 325-326 (J. Cooke ed. 1961) (separation of powers "d[oes] not mean that [the three departments] ought to have no *partial agency* in, or no *controul* over the acts of each other"). Just as a President is not absolutely insulated from a judicial subpoena in an ongoing judicial investigation, see *United States* v. *Nixon*, 418 U.S. 683, 706 (1974), so too the efforts of the Judicial Branch to prevent the unauthorized disclosure of classified information need not be absolutely insulated from Executive Branch resources and expertise. The fact that court support staff are subjected to FBI background checks does not "impermissibly threaten[] the institutional integrity of the Judicial Branch," *CFTC* v. *Schor*, 478 U.S. at 851. On the contrary, "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*" in light of the competing interests. *Id.* at 856.

As the court of appeals recognized (Pet. App. 9a-10a), there can be no dispute that the Executive Branch has a compelling interest in protecting clas-

sified information. See *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980); see also *Chicago & S. Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *United States* v. *Curtiss-Wright Export Co.*, 299 U.S. 304, 320 (1936). It is likewise clear that the judiciary is the least suited of the three branches to the task of assessing the dangers that classified information may present to national security and foreign affairs. Cf. *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government."). As a practical matter, the Executive Branch has access to resources and expertise for assessing security risks that are simply unavailable to the judiciary. The Constitution does not require that the Judicial Branch seal itself off from these valuable resources. On the contrary, this Court has said that the security risks that arise when the government seeks a search warrant in cases involving national security "can be minimized by proper administrative measures, possibly to the point of allowing the Government itself [*i.e.*, the Executive Branch] to provide the necessary clerical assistance" to the court. *United States* v. *United States District Court*, 407 U.S. 297, 321 (1972). See also *United States* v. *Yunis*, 867 F.2d 617, 621 n.8 (D.C. Cir. 1989) ("Because members of the federal judiciary and their staffs are generally not familiar with security procedures, we think it wise that judges within this Circuit direct their respective court security officers to review orders, decisions, and memoranda before they are released.").

The CIPA security procedures issued by Chief Justice Burger reasonably accommodate the competing

concerns of judicial independence and protection of classified information that arise in security-sensitive criminal cases. The intrusion upon the court is minimal in light of the magnitude of the competing interests. The judge himself is not required to undergo any background check, see CIPA Security Procedures, Section 4, 18 U.S.C. App. at 709. In addition, the judge may decide to forgo background checks of his staff by using Executive Branch officials to assist with any clerical responsibilities, *ibid.*, or by handling the case file himself. See, *e.g.*, *Bowers* v. *United States Dep't of Justice*, 690 F. Supp. 1483, 1488-1489 (W.D.N.C. 1987).[4]

Thus, there is no merit to petitioner's claim that subjecting court staff to background checks by the Executive Branch as a precondition to handling classified information destroys the court's impartiality by rendering it dependent upon the Executive Branch. As this Court said in *Mistretta*, in the context of a constitutional challenge to a statute giving the President power to appoint federal judges to the United States Sentencing Commission:

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[4] Petitioner concedes (Pet. 21) that the decision of the court of appeals does not conflict with any decision of any other court of appeals. The only other court of appeals that has considered the issue agrees with the Sixth Circuit. See Pet. App. 11a (discussing *In re United States Dep't of Justice*, No. 87-1205 (4th Cir. Apr. 7, 1988)). Petitioner incorrectly cites Judge Gesell's comments from the bench during a pretrial hearing in *United States* v. *Poindexter*, No. 88-80 (D.D.C.), as an instance in which a district court refused to submit its support staff to security background checks. Judge Gesell's comments indicated that all staff members who received classified information had in fact applied for security clearances. The court therefore did not confront the issue whether its staff could participate in a CIPA case and handle classified information without obtaining security clearances.

> The mere fact that the President within his appointment portfolio has positions that may be attractive to federal judges does not, of itself, corrupt the integrity of the Judiciary. Were the impartiality of the Judicial Branch so easily subverted, our constitutional system of tripartite government would have failed long ago. We simply cannot imagine that federal judges will comport their actions to the wishes of the President for the purpose of receiving an appointment to the Sentencing Commission.

109 S. Ct. at 674. Similarly, it is difficult to imagine that the integrity of the judicial process will be destroyed by the security clearance process required under the CIPA regulations. The independence of the judiciary is not so easily subverted.

3. There is no merit to petitioner's argument (Pet. 17-20) that requiring court support staff to undergo background checks exceeds Congress's delegation of authority in CIPA to the Chief Justice and the Executive Branch. Section 9(a) of CIPA authorized the Chief Justice, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, to prescribe "rules establishing procedures for the protection against unauthorized disclosure of any classified information." 18 U.S.C. App. at 708. The requirement that court support personnel undergo background checks plainly establishes a procedure that protects against unauthorized disclosures. It is true that Section 9(a) of CIPA was "based on Section 103(c) of the Foreign Intelligence Surveillance Act" (FISA), 50 U.S.C. 1803(c). S. Rep. No. 823, 96th Cong., 2d Sess 11 (1980). But, as the court of appeals noted (Pet. App. 7a-8a), the procedures applicable under FISA are quite similar to the CIPA procedures. Petitioners incorrectly as-

sert (Pet. 18) that the FISA regulations "leave[] the 'determination' of what clearance is 'appropriate' always in the hands of the court." In fact, the FISA procedures expressly state that

> [p]ersonnel appointed by or designated for service to the court, shall undergo appropriate background investigation by the Federal Bureau of Investigation under the standards established by [CIA directive] as concurred in by the Attorney General. These personnel shall not have access to classified information unless they have received a security clearance deemed appropriate by the court in consultation with the Attorney General and the Director of Central Intelligence.

Security Procedures Established Pursuant to Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, by the Chief Justice of the United States for the Foreign Intelligence Surveillance Court, Section 4, *reprinted in* H.R. Rep. No. 558, 96th Cong., 1st Sess. 7-8 (1979). Finally, petitioner's contention that the requirement of background checks is more than the type of "housekeeping" measure contemplated by Congress is refuted by a House Report accompanying CIPA that expressly refers to procedures governing "how many court employees can have access to [classified] documents" and "the physical security of documents" as "housekeeping rules." H.R. Rep. No. 831, 96th Cong., 2d Sess. Pt. 2, at 8 (1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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BRIEF OF AMICUS CURIAE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
I. Interest of Amicus Curiae	1
II. Summary of Argument	2
III. Argument: Reasons Why Amicus Urges the Court to Grant the Writ	3
A. Structural Factors Have Heretofore Frustrated Appellate or Certiorari Review and Will Continue to Inhibit Review	3
B. The Threat to Separation of Powers is Immediate and Individualized	6
IV. Conclusion	8
Addendum	A-1

TABLE OF AUTHORITIES

Page(s)

Cases:

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 847 (1986) 6

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 6

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 6

United States v. Fernandez, No. 88-0236 (D.D.C.) 3,5

United States v. Poindexter, et al., No. 88-0080 (D.D.C.) 3,5

Constitution, Statutes and Regulations:

U.S. Const. art. III, §1 6

U.S. Const. amend. V 6

U.S. Const. amend. VI 6

Classified Information Procedures Act (CIPA), Pub.L. 96-456, 94 Stat. 2025, 18 U.S.C. App. IV ..... *passim*

CIPA §3, 18 U.S.C. App. IV §3 3

CIPA §7, 18 U.S.C. App. IV §7 3,5

Security Procedures Established Pursuant to Pub.L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information (CIPA Security Procedures), 18 U.S.C.A. App. IV §9 note (Supp. 1990) 3

CIPA Security Procedures §4 6

Other Authorities:

J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980) 7

P. Koh, *The National Security Constitution* (1990)..... 7

Tamanaha, *A Critical Review of the Classified Information Procedures Act,* 13 Am. J. Crim. L. 277 (1986) 4

Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1 (1959) 7

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BRIEF OF AMICUS CURIAE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. INTEREST OF AMICUS CURIAE

The Tennessee Association of Criminal Defense Lawyers (TACDL) is a nonprofit corporation chartered in 1973. It is an association composed predominantly of lawyers actively engaged in the representation of criminal defendants and committed to promoting justice and the common good. TACDL became involved in this case as amicus in the court of appeals because of the threat to fair trials posed by the government's practice of requiring security clearances for judicial staff and defense counsel in cases litigated under the Classified Information Procedures

Act (CIPA). In the court of appeals, TACDL filed a 38-page brief and extensive addendum containing relevant statutes, unpublished orders, legislative and regulatory history and other materials. With permission, counsel for TACDL argued the case for appellee (petitioner in this Court) in the court of appeals. Written consents obtained from counsel for the petitioner and from the Solicitor General for the United States are attached hereto as an Addendum.

II. SUMMARY OF ARGUMENT

Amicus fully supports the reasons for granting the writ that were articulated in the Petition. In addition, amicus would emphasize those factors (in addition to the importance of the constitutional and regulatory issues involved) that especially warrant the exercise of the Court's discretionary certiorari jurisdiction. In particular, we point out that (1) structural factors in the CIPA statute, in the CIPA defense bar, and in the district courts have inhibited appellate review of the recurring problem presented by this case, and (2) this Executive intrusion into judicial independence poses a direct threat to individual liberties.

III. ARGUMENT: REASONS BY AMICUS URGES THE COURT TO GRANT THE WRIT

A. Structural Factors Have Heretofore Frustrated Appellate or Certiorari Review and Will Continue to Inhibit Review

Since the enactment of CIPA[1] in 1980 and the consequent promulgation of its Security Procedures[2] in 1981, CIPA's unilateral interlocutory appeal provision[3] effectively has insulated government security procedure practices in the district courts from appellate court supervision. Those practices have included a routine insistence that protective orders issued under CIPA §3 contain requirements that both judicial staff and defense personnel (including both defense counsel and other persons, such as witnesses, associated with the defense) undergo security clearance by the government. *See, e.g.*, Proposed Protective Order submitted Oct. 18, 1988 in the district court, R.11, excerpted in the Petition at 5-6.

With few exceptions,[4] the district courts faced with such proposed orders routinely have approved them. The reasons why

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[1] Classified Information Procedures Act, Pub.L. 96-456, 94 Stat. 2025, 18 U.S.C. App. IV.

[2] Security Procedures Established pursuant to Pub.L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, 18 U.S.C.A. App. IV §9 note (Supp. 1990).

[3] CIPA §7, 18 U.S.C. App. IV §7.

[4] Proposed orders containing such requirements were rejected by the district courts in favor of orders similar to that in the instant case in *United States v. Poindexter*, et al., No. 88-0080 (D.D.C.) and *United States v. Fernandez*, No. 88-0236 (D.D.C.). In both cases, the judges' staffs apparently underwent screening procedures voluntarily. *See, e.g., Poindexter* Transcript of Hearing, Petition at A-31-33.

the district courts have adopted these orders appear to spring from a vicious cycle whereby questionable practice has become precedent by repetition.

First is the composition of the CIPA defense bar. A large percentage of CIPA cases are tried in the judicial districts inside the Beltway (District of the District of Columbia, District of Maryland, Eastern District of Virginia), reflecting the locations of those military, intelligence and related civilian institutions in which classified information is concentrated. In consequence, the CIPA defense bar tends to be concentrated among a group of former assistant United States attorneys in these judicial districts (or assistant attorneys general) who themselves have undergone "clearance" as government lawyers prosecuting CIPA cases.

These lawyers (now functioning as defense counsel) naturally tend to accept security clearance as a normal condition of participation in a CIPA case; even if in their new roles they now questioned the propriety of these measures, security clearance in their own cases would appear to be a moot point, as their continued clearance is presumably virtually assured. It also seems likely that the presumptively "cleared" status of these members of the CIPA defense bar offers cleared counsel a competitive advantage over other counsel in the view of an accused seeking prompt representation. *See* Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 Am. J. Crim. L. 277, 287-90 (1986).

With the attorneys for both sides usually accepting of the general necessity for CIPA security clearances, it is little wonder that many district courts have uncritically accepted the intrusion of having their own staffs (including law clerks) subjected to security investigations. Once the government decides to invoke CIPA, a district court shortly is visited by one or more Court Security Officers, who hold joint appointments in the Justice Department and the judiciary. These officers have routinized

the security practices (including security clearance applications) in CIPA cases. At the same time, the district court is presented with a proposed protective order, accompanied by assurances from the government that identical orders have been adopted by a number of other district courts in other CIPA cases. Absence of the customary adversarial testing of the government's position, coupled with the judicial imprimatur represented by the advent of the Court Security Officers and the "model" orders, has had predictable results.

The government's success in the district courts has been amplified by the unilateral interlocutory appeal afforded the government by CIPA §7. Before final judgment, defendants have no appeal of right on CIPA issues. After final judgment, CIPA-issue appeals by acquitted defendants are moot; and counsel for convicted defendants would be unlikely to concentrate their efforts on an issue upon which it may be difficult to demonstrate prejudice to the defendant.

Thus rulings adverse to the defendant are unlikely to be raised on appeal at any stage. The government, on the other hand, has been free to choose between those instances in which it elects to appeal pretrial (as in this case) and those in which it simply accepts an adverse district court ruling without seeking appellate reversal. *E.g.*, *Poindexter* and *Fernandez, supra* n.4.

Under these circumstances, the fact that the instant case represents the first appellate precedent on the propriety under CIPA of Executive clearance of Judicial personnel should not deter the Court from exercising certiorari jurisdiction to effectuate supervisory control over aberrant district court practices.

The issue in this case simply is one in which the usual accumulation of precedent in the courts of appeals cannot be expected.[5]

B. The Threat to Separation of Powers is Immediate and Individualized

Finally, amicus would emphasize that the intrusion on judicial independence sanctioned by the court of appeals in this case is of very practical impact on the reality and perception of a criminal defendant's right to a fair trial under the Fifth and Sixth Amendments. As this Court recognized in *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 848 (1986), potential domination of the historically weak Judicial branch by the Executive implicates as a matter of the separation of powers not only the institutional interest of the judiciary but equally the individual litigant's interest in "independent and impartial adjudication" guaranteed by Article III, §1.

As the district court correctly observed, to permit the Department of Justice a "voice in selection of court personnel dealing with a case in which it is a party offends the most elementary notions of fair play and impartial justice." Petition at A-15, 706 F. Supp. at 595. This sensitivity to the reality and appearance of impartiality[6] must be all the more heightened in a criminal case

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[5] The court of appeals' ruling that the issue of who has the "final authority" to determine which judicial employees may have access to classified information after security clearance investigations have been performed is not "ripe for review" ignores the language of CIPA Security Procedure §4, the practical realities of security investigation, and the record in this case: "Any problem of security . . . shall be referred to the court for appropriate action," CIPA Security Procedure §4; the person with "final authority" over the outcome obviously will have an influence over the scope of the investigation; and the prosecutor in this case was involved in the scope of the investigation of defense counsel. *See* Petition at 14 & n. 7, A-34.

[6] Impartial adjudication, including the appearance of impartiality, has been held by this Court also to have roots in the due process clause. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 & n.12 (1988); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

under CIPA, in which the defendant's liberty is at stake and the court plays an often pivotal role in deciding the nature and form of classified information that may be used as evidence either by the prosecution or the defense.

The immediacy of this threat to individual liberties and to the integrity of the judicial process warrants the intervention of this Court. This is an instance in which "the Constitution has committed to another agency of government [the judiciary] the autonomous determination of the issue raised [selection of personnel for participation in a given case]," and judicial review is both essential and prudential. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 7-8 (1959). This is not an instance in which the judiciary can afford to stand by while the other branches resolve their collision using primarily political weaponry. "Judicial tolerance" of Executive predominance in areas of national security must find its limits at the unacceptable erosion of individual liberties. *See* P. Koh, *The National Security Constitution* ch. 6, 9 (1990); J. Choper, *Judicial Review and The National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 217-315 (1980).

III. CONCLUSION

For the reasons stated above, amicus urges the Court to grant the Petition for a Writ of Certioari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Criminal Defense Lawyers
Amicus Committee

ADDENDUM

ADDENDUM 1

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

August 1, 1990

Edmund L. Carey, Jr., Esq.
Neal & Harwell
2000 One Nashville Place
150 Fourth Avenue, North
Nashville, Tennessee 07219-2417

Re: *Smith v. United States*, No. 90-58

Dear Mr. Carey:

This is in response to your letter of July 31, 1990.

On behalf of the United States I hereby consent to the filing of a brief *amicus curiae* on behalf of Tennessee Association of Criminal Defense Lawyers in the above case.

Sincerely,

/s/ Kenneth W. Starr
Solicitor General

ADDENDUM 2

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August 9, 1990

Mr. Edmund Lawrence Carey, Jr. Esq.
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Nashville, TN 37219-2417

RE: Michael Lynn Smith vs. United States
United States Supreme Court No. 90-58

Dear Ted:

This letter will serve to confirm that Michael Lynn Smith, Defendant in the above styled and numbered cause, is amenable to and hereby agrees to your filing an amicus curia brief on behalf of Tennessee Association of Criminal Defense Lawyers.

Thank you for your interest in this case and I look forward to working with you thereon.

With warmest, personal and professional regards, I remain

Very sincerely yours,

/s/ N. Reese Bagwell

NRB:cc

FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-58

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

MICHAEL LYNN SMITH,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

STATEMENT OF THE INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT I

CONGRESS HAS IMPERMISSIBLY DELEGATED LEGISLATIVE AUTHORITY TO THE CHIEF JUSTICE 4

ARGUMENT II

SECTION FOUR OF THE SECURITY PROCEDURES VIOLATES THE SEPARATION OF POWERS 11

CONCLUSION 21

APPENDIX

Order of the Circuit Court, In Re United States Department of Justice, No. 87-1205 (4th Cir. April 7, 1988) A-1

TABLE OF AUTHORITIES

CASES: Page

A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) 6

American Power & Light Co. v. Securities Exchange Commission, 329 U.S. 90 (1946) 5

Bowers v. United States Department of Justice, 690 F.Supp. 1483 (W.D.N.C. 1987) 20

Buckley v. Valeo, 424 U.S. 1 (1976) 13

Chandler v. Judicial Counsel, 398 U.S. 74 (1970) 18

Commodity Future Trading Comm'n v. Schor, 478 U.S. 883 (1986) 14

Field v. Clark, 143 U.S. 649 (1892) 4

J. W. Hampton, Jr., and Co. v. United States, 276 U.S. 394 (1928) 5

Page

Mistretta v. United States,
488 U.S. ___, 109 S.Ct. 647
(1989) ..... passim

Morrison v. Olson,
487 U.S. 654, 663 (1988) 17

Panama Refining Co. v. Ryan,
298 U.S. 388 (1935) 6

United States v. Chambless,
680 F.Supp. 793 (E.D. La. 1988)..... 8

Yakus v. United States,
321 U.S. 414 (1944) 8

LAW REVIEWS:

Burbank, The Rules Enabling Act of
1934, 130 U.P.L.Rev. 1015
(1982) 10

Gallant, Judicial Rule-Making Absent
Legislative Review: The Limits of
Separation of Powers, 38 O.L.R.
447 (1985) 10

Levin & Amsterdam, Legislative Control
Over Judicial Rule-Making: A Problem
in Constitutional Revisions, 107
U.P.L.R. 1 (1958) 10

Page

Whitten, Separation of Powers: Restrictions on Judicial Rule-Making: A Case Study of Federal Rule IV, 40 M.L.R. 41 (1988) 10

OTHER AUTHORITIES:

28 U.S.C. Section 2072 4

Classified Information Procedures Act, Section 9 10,11

Classified Information Procedures Act, Section 9(a) 9

The Federalist No. 51, p. 349 (J. Cooke Ed. 1961) 12

Foreign Intelligence Surveillance Court of Review, Section 4 16

Security Procedures, Section 4 ... 14,20,21

United States Constitution, Article I, Section 1 4

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than twenty-five thousand lawyers, including representatives of every state. The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's

objectives, and of the criminal justice system, is the protection and preservation of the traditional independence of the Judicial Branch of government. The NACDL is acutely concerned about any decision that would weaken the independence of the Judicial Branch of government, as would the adoption of the position taken by the government in the present case.

The Amicus Curiae Committee of the NACDL has discussed this case and determined that the issues are of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court. Without necessarily endorsing our positions, all parties have consented to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court: Honorable Kenneth W. Starr, Solicitor General of the United States, on behalf of respondents and

N. Reese, Bagwell, Jr., Defender for Michael Lynn Smith, on behalf of petitioner. Letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Order of the Chief Judge was plainly correct. The constitutional principle of the separation of powers has been violated, first by Congress in making a broad and undirected delegation of rule-making authority to a single individual and thereafter by the Chief Justice in promulgating security procedures which give the Executive Branch the sole right to determine who may be employed by the Judicial Branch in the trial of cases of this kind.

ARGUMENT

I. CONGRESS HAS IMPERMISSIBLY DELEGATED LEGISLATIVE AUTHORITY TO THE CHIEF JUSTICE.

The power to legislate was explicitly given to the Congress of the United States. Article I, Section 1 of the Constitution provides in pertinent part:

> [a]ll Legislative Powers herein granted shall be vested in a Congress of the United States.

U.S. Const., Art. I, Section 1.

Congress cannot generally delegate its legislative power to another branch of government. Field v. Clark, 143 U.S. 649 (1892).

Under certain narrowly drawn circumstances, however, Congress may delegate its power to prescribe procedures for the federal courts to the Federal Judiciary itself. Rules Enabling Act of 1934, 28 U.S.C. § 2072.

In delegating congressional authority to a coordinate branch of government, Congress must however:

> Lay down by legislative act an intelligible principle to which the person or body authorized to [exercise a delegated authority] is directed to conform ....

J.W. Hampton, Jr. and Co. v. United States, 276 U.S. 394, 409 (1928).

Such delegations of Congressional power are constitutionally sufficient only if:

> Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

American Power & Light Co. v. Securities Exchange Commission, 329 U.S. 90 (1946) (emphasis supplied).

The Supreme Court itself has of course struck down delegation statutes where Congress provided insufficient standards to confine the discretion of the authorities to whom Congress purportedly delegated power. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

In contrast, however, where the delegation of Congressional authority is specific and restricted, Congress may delegate its powers to a commission appointed by the Executive and staffed in substantial measure by members of the Judiciary. Mistretta v. United States, 488 U.S. __, 109 S.Ct. 647 (1989).

Speaking for a majority of eight in Mistretta, Justice Blackmun noted that the delegation of authority from Congress to the Sentencing Commission was

constitutional because, among other things, Congress restricted the delegation of authority by specifying (1) three goals for the Commission to meet, (2) specifying four "purposes" of sentencing the Commission should carry out, (3) specifying a specific tool by which to achieve these goals, (4) directing the Commission to consider seven different factors in formulating offense categories, (5) directing the Commission to consider eleven different factors in establishing categories of defendants and, finally, (6) providing detailed guidance about categories of offenses and defender characteristics. Id. at 655-657.

In upholding the constitutionality of this delegation of powers, the Supreme Court noted:

> '...
>
> Only if we could say there was an absence of standards for the guidance of the

> Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose ....'

Id. at 658, quoting with approval, Yakus v. United States, 321 U.S. 414, 425-426 (1944).

In further upholding the delegation of authority in Mistretta, the Court also noted with approval:

> The statute outlines the policies which prompted establishment of the Commission explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations.

Id. at 658, citing with approval, United States v. Chambless, 680 F.Supp. 793 (E.D.La. 1988).

Section 9 of the present statute is deficient in all these respects. It does not outline the policies which prompted the delegation of authority to the Chief Justice, it does not explain what the Chief Justice should do, nor how he should accomplish it and, finally, it does not set out specific directives to govern particular situations.

Indeed, all that Section 9 purports to do is to delegate to the Chief Justice the unlimited Congressional authority to "prescribe rules establishing procedures for the protection of unauthorized disclosure of any classified information in the custody of the United States District Courts, Courts of Appeal, or Supreme Court." CIPA at Section 9(a).[1]

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[1]Whether the Supreme Court or the Chief Justice has the independent power to make rules for the Judicial Branch of government is a separate issue not presented on the

(continued...)

For the same reasons which impelled the Supreme Court to approve the delegation of authority in Mistretta, this Court should reject the attempted delegation of authority set forth in Section 9 of the Classified Information Procedures Act. Inasmuch as the delegation of authority is overly broad, security

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[1](...continued)
facts of this case. It is clear that the procedures in question here were prepared in response to a Congressional delegation of power and that their promulgation was not an independent act by the Judiciary drawing upon its own powers. See the comprehensive review of judicial rule making set out in Burbank, The Rules Enabling Act of 1934, 130 U.P.L.R. 1015 (1982); see also, Whitten, Separation of Powers: Restrictions on Judicial Rule-Making: A Case Study of Federal Rule 4, 40 M.L.R. 41 (1988); Gallant, Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers, 38 O.L.R. 447 (1985); Levin & Amsterdam, Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revisions, 107 U.P.L.R. 1 (1958).

procedures established pursuant to that authority are invalid.[2]

II. SECTION FOUR OF THE SECURITY PROCEDURES VIOLATES THE SEPARATION OF POWERS.

An independent Judiciary is the cornerstone of the Republic. Any action by the Executive Branch of government that threatens the independence of the Judiciary compromises our system of criminal justice.

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[2]Not only is this delegation of Congressional power impermissibly broad, the fact the delegation is to a single individual, albeit a distinguished one, and the fact that his fiat becomes law within 45 days after he reports to Congress renders Section 9 constitutionally suspect as well. In sum, what Congress has accomplished in Section 9 is a virtually unprecedented delegation of Congressional power to an individual citizen whose report to Congress becomes law within such a brief period of time that the Congressional power of review becomes meaningless. Under these circumstances, Congress appears has abdicated, not delegated, its authority.

While it is true that the Framers did not require the three Branches to be entirely separate and distinct, the three branches must function in such a way that no branch may encroach at the expense of another.

As Madison admonished:

> [T]he greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means and personal motives to resist encroachment of the others.

The Federalist No. 51, P. 349 (J.Cooke ed. 1961).

In consequence, the Supreme Court has regularly noted that the Framers of the Constitution:

> Built into the tripartite Federal Government ... a self-executing safeguard

> against the encroachment or aggrandizement of one Branch at the expense of the other.

Buckley v. Valeo, 424 U.S. 1 (1976).

For this reason, the Supreme Court in Mistretta rearticulated its traditional concern that one Branch not intrude into the affairs of the other:

> It is this concern of encroachment and aggrandizement that has animated our separation of powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power'.. Accordingly we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate branches or that undermine the authority or independence of one or another coordinate branch.

Mistretta, 109 S.Ct. at 659-660 (emphasis supplied).

No provision of law may impermissibly threaten the institutional integrity of the Judicial Branch. Mistretta, 109 S.Ct. at 660, citing with approval Commodity Future Trading Comm'n v. Schor, 478 U.S. 883 (1986).

There can be little doubt that the Security Procedures promulgated by the Chief Justice represent just such an impermissible threat to the institutional integrity of the Judicial Branch.

As the Chief Judge for the Middle District of Tennessee pointed out, the critical deficiency in the Procedures is the fact that the Executive, not the Judicial Branch, ultimately determines which Judicial employees to trust and under what circumstances.

Section 4 of the Security Procedures specifically provides that it is the Department of Justice security officer, not the court security officer, who shall approve clearances and thereby determine who among these Judicial employees may assist the Judge. The Executive Branch therefore determines which law clerks, court reporters, courtroom deputies and secretaries may assist the Judge who hears a case.

As a practical matter, the Executive Branch has become the exclusive master of the House that once belonged to the Judiciary. Since it is the Department of Justice which now determines who may serve the Court, the Executive Branch has encroached upon the institutional integrity of the Judicial Branch in precisely the

fashion warned against by the Supreme Court in Mistretta.[3]

It is important to note that the only other comparable Judicial security regulations, those which govern the Foreign Intelligence Surveillance Court, ultimately assign to the Court, not the Executive Branch, the duty of determining the nature, scope and importance of a security clearance for courtroom personnel. See Security Procedures Established by the Chief Justice for the Foreign Intelligence Surveillance Court and the Foreign

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[3]It is of no constitutional significance that the security regulations in question were promulgated by the Chief Justice at the urging of Congress. It is the effect, not the origin, of the Procedures which is constitutionally significant. In similar fashion, in more ancient times, the Trojan Horse was admitted into the City of Troy at the order of a single distinguished commander. The ruinous effect of that decision was unrelated to the rank of the officer who gave the ultimate command.

Intelligence Surveillance Court of Review at Section 4.

Control is the key. As the Supreme Court noted in upholding the Ethics in Government Act, the Independent Counsel statute did not impermissibly interfere with the Executive control of the prosecutive function because a president could dismiss the independent counsel for "good cause." Morrison v. Olson, 487 U.S. 654, 663 (1988). In the present case, however, the power to remove Judicial personnel now rests in the Executive, not the Judicial Branch of government. It is precisely this lack of control which invalidates Section 4 of the Security Procedures.

It is for Judges, not prosecutors, to ultimately decide who among their judicial employees may hear such cases and under what circumstances. Law

clerks, court reporters, courtroom deputies, and secretaries are not fungible. They are not to be shifted from court to court at the direction of the Department of Justice, as if they were interchangeable parts in the machinery of justice.

Moreover, Chief Judge Wiseman was right to be sensitive to the appearance which Section 4 creates among the public. As the Supreme Court has recently held:

> The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-Partisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of Judicial action.

Mistretta, 109 S.Ct. at 672-673. See also Chandler v. Judicial Counsel, 398 U.S. 74 (1970) ("there can of course, be no disagreement among us as to the imperative

need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.")

In this respect the Chief Judge rightly warned that:

> Allowing the Department of Justice any voice in selection of court personnel dealing with a case in which it is a party offends the most elementary notions of fair play and impartial justice.

Order, at 3.

Likewise, the District Court properly rejected the unpublished views of the Fourth Circuit in In Re United States Department of Justice, No. 87-1205 (4th Cir. April 7, 1988) (App. A-1). In deciding that the CIPA Security Procedures also apply to classified information in a civil case involving the Freedom of Information Act, the Fourth Circuit plainly engaged in judicial legislation of its own

and went well beyond the requirements of CIPA. Moreover, it failed to address the central issue presented by this case, the constitutionality of Section 4.[4]

While Chief Judge Wiseman recognized that the Judicial Branch has as much concern about national security as does the Executive Branch, he rightly recognized that due deference to national security does not require the Judicial Branch to tolerate the kind of massive intrusion into its constitutional functions and prerogatives which is contemplated by Section 4 of the Security Procedures.

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[4]Perhaps for that reason the Fourth Circuit refused publication of what would otherwise be a leading case. Rule 18, Rules of the Fourth Circuit. For the District Court's response to the Fourth Circuit's ruling see Bowers v. United States Department of Justice, 690 F.Supp. 1483 (W.D.N.C.) (declining to require security clearances for judicial personnel).

For these reasons, the Chief Judge in the present case properly refused to permit the Executive Branch of government to subject his courtroom personnel to intrusive personal examination and to determine which of his judicial employees was fit to assist him in the trial of this case.

Section 4 of the Security Procedures issued pursuant to Section 9 of the Classified Information Procedures Act is unconstitutional and this Court should so hold.

III. CONCLUSION

For the reasons stated above, amicus urges the Court to grant the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-1205

In Re United States Department of Justice,

Petitioner.

ORDER

Before the Court for renewed consideration is a petition by the United States Department of Justice for a writ of mandamus pursuant to 28 U.S.C. § 1651 and Fed. R. App. P. 21. Petitioner initially sought the writ to compel District Judge James McMillan to delay an in camera

inspection of certain classified documents sought by a plaintiff in a civil action brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 until all members of Judge McMillan's staff who would have access for the classified material obtained appropriate security clearances. Judge McMillan had originally declined the Department of Justice's request for security clearances concluding that it was an "extraordinary demand" constituting an unacceptable effort to restrict the court's jurisdiction.

In an order issued on December 30, 1987, this Court withheld issuance of the writ but directed Judge McMillan to reconsider his refusal to order security clearances in light of the significant national interest in preserving legitimate confidentiality. We

specifically directed the district judge's attention to the well-established dedication to national security embodied in this Court's opinion in Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975), as well as in the regulations adopted by the Chief Justice of the United States pursuant to 18 U.S.C. App. § 9.

On January 14, 1988, Judge McMillan issued an opinion announcing that after conducting the reconsideration ordered by this Court, he adhered to his view that he was not required to the FOIA case. This Court then directed that Judge McMillan file a formal response to the petition for mandamus pursuant to Fed. R. App. P. 21. That response has now been filed and the matter is ripe for final disposition.

It is evidence from his response that the district judge continues to view the government's request for security clearances as an improper effort by the executive branch to intrude upon judicial prerogatives. Judge McMillan contends that the rules adopted by the Chief Justice of the United States pursuant to the Classified Information Procedures Act which require security clearance for judicial employees in criminal cases have no precise analogue in civil litigation such as the instant FOIA case. Judge McMillan thus argues that his refusal to delay the FOIA case pending security clearance of his staff is not contrary to any specific statute, applicable rule or controlling authority, and thus cannot be a "clear error" justifying mandamus. We must

disagree with the district judge's assessment.

By relying in part upon a Justice Department executive order to support its initial request for security clearances, the government's pleading may well have been ill advised and even tactless. At this juncture, however, there can be no serious suggestion that this matter involves nothing more than an attempt by the executive branch to restrict the judiciary. The central question properly before us is whether the national interest in preventing unauthorized disclosure of classified material demands reasonable deference from all branches of the government. We are persuaded that it does.

As we noted in our previous order, this Court's concern for potentially damaging disclosure of sensitive and

classified material in the course of the judicial process is well established. See Colby, supra. Moreover, the Supreme Court has consistently held that preserving the secrecy of information important to national security is a matter of compelling interest. See, e. g., Snepp. v. United States, 444 U.S. 507, 509 n.3 (1980).

It is true that Congress has not, to date, specifically provided the same security measure in civil cases that it has mandated in criminal prosecutions. Unlike Judge McMillan, however, we perceive no diminished commitment to national security in Congress' present silence. Logically, the damage attendant to disclosure of classified materials is unaffected by the legal context in which the disclosure occurs. We cannot conclude, therefore, that Congress, by omission, has sanctioned

an irrational distinction between disclosure in a civil case and a criminal prosecution.

Although mandamus is traditionally viewed as the appropriate remedy only in instances of clear error, the writ may also be issued by the Court of Appeals when supervisory control of the district court is "necessary to the proper judicial administration of the federal system." United States Board of Parole v. Merhige, 487 F.2d 25 (4th Cir. 1973), quoting LaBuy v. Howes Leather Co., 352 U.S. 244, 259-60 (1957). We are fully persuaded that such supervisory control is required here. Judge McMillan's refusal to obtain clearances for his staff presents the government with two equally unpalatable alternatives - face contempt sanctions for failure to disclose or by providing

unauthorized persons with access to classified materials, take an action that cannot be remedied by a normal appeal. Requiring routine security clearance for Judge McMillan's staff avoids this dilemma in a minimally intrusive fashion that also adequately guards the undisputed national interest. In reaching this conclusion, we are confident that the relevant clearance procedures will operate in an expeditious manner, thereby avoiding undue delay in the instant litigation.

Accordingly, it is ORDERED that the petition of the United States Justice Department for a writ of mandamus is granted. Pursuant to this order, District Judge James McMillan will not require the production of any classified material with regard to the pending civil litigation until those members of his staff who will

have access to those documents obtain security clearance.

ENTERED this 7th day of April, 1988, at the direction of Judge Hall with the concurrences of Judge Phillips and Judge Sprouse.

JOHN M. GREACEN
Clerk of the Court